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ABSTRACT

The following are outlines presented by individuals at the Education Law Association 2001 winter seminar: "Academic Freedom and the Religiously Affiliated University" (the freedom to teach, research, and publish has never been--and still is not--without limits); "How Random and Suspicionless May School Searches Be" (random and suspicionless drug testing of students who participate in specific activities has gained popularity, raising concerns about the potential for violation of the Fourth Amendment rights of students); "Wow! Did You Hear What They Said? Trends in the Use of Immorality as a Cause of Dismissal for School Personnel" (a taxonomy of lawsuits involving different types of immorality); "Facing a Day in Court: A Collaborative Learning Model for University Professors and School Practitioners" (redesign of curriculum and application in the administrator preparation program as it relates to coursework in school law); "The Legal Requirements of Title IX in Athletics" (jurisdiction, legal history, Title IX basics, athletic financial assistance, and effective accommodation of student interests); "The Free Expression Rights of Faculty in the Information Age. Copyright Law in Cyberspace: The Impact on Faculty Ownership and Productivity" (an examination of litigation regarding constitutional rights, especially those of free expression, and the electronic media); and "Zero Tolerance or (In)tolerance Policies? Due Process and the Law of Student Suspensions and Expulsions" (an examination of zero-tolerance policies largely in relation to their legal implications in regard to the law of student suspensions and expulsions). (Each paper contains references.) (DFR)

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Changes & Challenges:
Hot Topics in a New Era of Schools

WINTER SEMINAR 2001

MARCH 15-18, 2001
LANDMARK INN
PARK CITY, UTAH

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Education Law Association - 2001 Winter Seminar
Landmark Inn, Park City, Utah
March 15 – 18, 2001

CHANGES & CHALLENGES: HOT TOPICS IN A NEW ERA OF SCHOOLS

Seminar Outlines

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ACADEMIC FREEDOM AND THE RELIGIOUSLY AFFILIATED UNIVERSITY

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EDUCATION LAW ASSOCIATION
WINTER SEMINAR 2001
PARK CITY, UTAH
MARCH 15-18, 2001

Ronald Z. Ahrens

ACADEMIC FREEDOM AND THE RELIGIOUSLY AFFILIATED UNIVERSITY

I. THESIS

The freedom to teach, research and publish are necessary to a university, however, such freedom never has been (and still is not) without limits. Despite contrary indications from some in the academic community, institutions may reasonably limit academic freedom and still be considered legitimate universities. Such limits actually contribute to the vitality of the academic community.

II. THE HISTORICAL CHARACTERISTICS OF THE UNIVERSITY

History shows that academic freedom has not been an essential element in institutions' efforts to claim university status. Though the designation "university" has been used for at least nine centuries, commentators have yet to agree upon a succinct, universally applicable definition of the term. Institutions have claimed the designation when they have exhibited one or more of the following characteristics: 1) are autonomous communities of scholars; 2) are granted university status by church or government; 3) offer programs in some or all of the four traditional professions; 4) award advanced degrees; 5) teach; and, 6) are devoted to the discovery of truth through research.

Sources:

-DANIEL COIT GILMAN, UNIVERSITY PROBLEMS IN THE UNITED STATES 85 (1898)
-Henry P. Tappan, *On University Education 1851, in* AMERICAN HIGHER EDUCATION 2:488 (Hofstadter et. al. eds. 1961)
-William Frijhoff, *Patterns, in* A HISTORY OF THE UNIVERSITY IN EUROPE, 49 (Hilde De Ridder-Symoens, ed. 1996)
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-J.M. CAMERON, ON THE IDEA OF A UNIVERSITY 26 (1978)
-ALAN B. COBBAN, THE MEDIEVAL ENGLISH UNIVERSITIES: OXFORD AND CAMBRIDGE TO C. 1500 2 (1988)
-S.S. LAURIE, THE RISE AND EARLY CONSTITUTION OF UNIVERSITIES 178 (1886)
-Ian Winchester, *The Future of a Mediaeval Institution, in* THE FUTURE OF A MEDIAEVAL INSTITUTION THE -UNIVERSITY IN THE TWENTY-FIRST CENTURY 271 (William A.W. Neilson et al. eds. 1986)
-WILLIAM CLYDE DEVANE, THE AMERICAN UNIVERSITY IN THE TWENTIETH CENTURY 5 (1957)
-F.H. Hedge, *On University Reform, 1866, in* AMERICAN HIGHER EDUCATION 2:561 (Hofstadter et. al. eds. 1961)

III. THE LIMITATIONS OF ACADEMIC FREEDOM

Academic Freedom is now commonly accepted as an important component of the ideal university. However, as with all freedoms, the doctrine of academic freedom is not absolute; historically, it has been limited in several ways. The academy, the AAUP and the courts have each recognized restrictions on academic freedom which do not call into question the reputation of the institution enforcing the restrictions.

A. Limitations Imposed by the Academy

Members of the academy recognize several general limitations to the doctrine of academic freedom. First, nearly all academics recognize that professors are hired to teach and research in certain areas. Second, some commentators characterize speech which is offensive, harassing or hateful as outside the boundaries of academic speech protection. Similarly, others think that speech that advocates a certain political or social position is outside the scope of academic freedom protection as well. Third, the secular academy imposes restrictions on academic freedom by limiting religious speech.

Sources:

-Cass R. Sunstein, *Academic Freedom and Law: Liberalism, Speech Codes, and Related Problems, in* THE FUTURE OF ACADEMIC FREEDOM 181(Louis Menand, ed. 1996)
-Stephen L. Carter, *The Constitution and the Religious University*, 47 DE PAUL L. REV. 479, 493 (1998)
-Louis Menand, *The Limits of Academic Freedom, in* THE FUTURE OF ACADEMIC FREEDOM 4 (Louis Menand, ed. 1996)
-Bishop v. Aronov, 732 F. Supp. 1562, 1563 (N.D. Ala. 1990)
-James D. Gordon, III & W. Cole Durham, Jr., *Toward a Diverse Diversity: The Legal Legitimacy of* Ex Corde Ecclesiae, 25 J.C. & U.L. 697, 711(1999)
-MARK R. SCHWEHN, EXILES FROM EDEN: RELIGION AND THE ACADEMIC VOCATION IN AMERICA vii (1993)
-Douglas Laycock, *Religious Commitment, and Religious Integrity*, 78 Marq. L. Rev 297,307 (1995)

B. Limitations Imposed by the AAUP

The AAUP itself also recognizes limits to academic freedom. According to the AAUP, a professor may not blatantly lie, or engage in meaningless scholarship without consequence. While the scope of these prohibitions has been debated, they clearly restrain speech and support the proposition that some limits exist. Additionally, many once believed that the AAUP recognized the existence of the right of religiously affiliated universities to limit speech which interfered with the religious mission of a university.

Sources:

-1915 General Declaration of Principles" can be found at General Report of the Committee on Academic Freedom and Academic Tenure, reprinted in 2 American Higher Education: A Documentary History 860 (R. Hofstadter & W. Smith eds. 1961)
-Walter P. Metzger, *Professional and Legal Limits to Academic Freedom*, 20 J.C. & U.L. 1 (1993)
-WALTER METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY 101 (1995)
-Ralph F. Fuchs, *Academic Freedom–Its Basic, Philosophy, Function, and History, in* ACADEMIC FREEDOM: THE SCHOLARS PLACE IN MODERN SOCIETY 17 (Hans W. Baade, ed. 1964)
-The 1970 Interpretive Comments on the 1940 Statement, *in* Sub-Committee of Committee A on Academic Freedom and Tenure, *The Limitations Clause in the 1940* Statement of Principles: *Some Operating*

Guidelines, ACADEME Sept.-Oct. (1988)

C. Constitutional Perspectives

Although the Supreme Court has acknowledged that academic freedom is a 'special concern of the First Amendment," the law has yet to recognize a constitutional cause of action on behalf of individual professors who have had their freedom limited; to date, there is no private right of action. Rather, the court has generally focused on the institutional academic freedom rights of colleges and universities.

Further, the Constitution forbids governmental, and non-governmental entities which assume governmental functions, from prohibiting the free exercise of religion. Denial of religious expression is unconstitutional. Because the establishment of a university is arguably an act of religious expression, denominationally affiliated universities' claim to university status may be protected from state action.

Sources:

-Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.")

-Regents of the University of Michigan v. Ewing, 474 U.S. 214, Fn 12 (1985)("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students but also, and somewhat inconsistently, on autonomous decision making by the academy itself.")

-Regents of the University of California v. Bakke, 438 U.S. 265 (1978)("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevails "the four essential freedoms" of a university–the right to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study")(Quoting Sweezy v. New Hampshire, 354 U.S. 234 263 (1957) (Frankfurter, J., concurring in result))

-Board of Regents of the University of Wisconsin v. Southworth, 120 S. Ct 1346 (2000)(Souter, J., concurring)("Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach.")

-Edwards v. California University of Pennsylvania, 156 F.3d 488, 491 (3rd Cir. 1998)("A public university professor does not have a First Amendment right to decide what will be taught in the classroom. The ability to decide what to teach is generally considered an academic freedom right")

-Boring v. Buncombe County Bd. Of Educ. 136 F.3d 364, 369-70(4th Cir. 1998)("The concept of academic freedom has never conferred upon teachers the control of public school curricula. . . . the school not the teacher has the right to fix the curriculum")

-Douglas Laycock & Susan E. Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 TEX L REV 1455, 1458 (1988)

-Terrence Leas and Charles J. Russo, *Waters V. Churchill: Autonomy For The Academy or Freedom For the Individual?*, 94 West's Educ. L Rev. 1099 (1994)

-Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 Tex L Rev 817 (1983)

-John A. Scanlan, *Symposium on Academic Freedom: Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1998)

-Harry F. Tepker, Jr. and Joseph Harroz, Jr., *On Balancing Scales, Kaleidoscopes, and the Blurred Limits of Academic Freedom*, 50 OKLA. L. REV. 1 (1997)

IV. Policy Considerations

Several justifications have been suggested for the wide latitude given to the academic community: 1) academic freedom is the best method of obtaining truth; 2) academic freedom promotes diversity; 3) academic freedom fosters the common good; and 4) academic freedom helps avoid false expectations. Each of these justifications can be used to support the notion that religiously affiliated universities should be allowed to limit academic freedom.

Statement on Academic Freedom

at Brigham Young University

September 14, 1992

PREFACE: At Brigham Young University, faculty and students are enjoined to "seek learning . . . by study and also by faith" (D&C 88:118). This integration of truth lies at the heart of BYU's institutional mission.[1] As a religiously distinctive university, BYU opens up a space in the academic world in which its faculty and students can pursue knowledge in light of the restored gospel as taught by The Church of Jesus Christ of Latter-day Saints. For those who have embraced the gospel, BYU offers an especially rich and full kind of academic freedom. To seek knowledge in the light of revealed truth is, for believers, to be free indeed.

The freedom to form religiously distinctive intellectual communities is protected not only by the principle of religious freedom but also by long-established principles of academic freedom.[2] The BYU community embraces traditional freedoms of study, inquiry, and debate, together with the special responsibilities implicit in the University's religious mission. These include the duty to exemplify charity and virtue, to nurture faith, and to endeavor to teach all subjects with the Spirit of the Lord.

This document articulates in clear but general terms how BYU's unique religious mission relates to principles of academic freedom. BYU regards the following approach not as narrowing the scope of freedom but as enabling greater (or at least different) and much prized freedoms.

I. INDIVIDUAL AND INSTITUTIONAL ACADEMIC FREEDOM AT BYU: The concept of academic freedom at BYU is grounded in a distinction, often blurred but vital and historically based, between individual and institutional academic freedom.[3] These two facets of academic freedom have been described as "the freedom of the individual scholar to teach and research without interference" and "the freedom of the academic institution from outside control."[4] Both individual and institutional academic freedom are necessary to maintain the unique intellectual climate of BYU. What follows is an attempt to define why both individual and institutional academic freedom are valuable at BYU and how they must be protected.

A. INDIVIDUAL FREEDOM: Individual freedom lies at the core of both religious and academic life. Freedom of thought, belief, inquiry, and expression are crucial no less to the sacred than to the secular quest for truth. Historically, in fact, freedom of conscience and freedom of intellect form a common root, from which grow both religious and academic freedom. It is no wonder then that both the Church and the academy affirm the need for individual freedom--the Church through the doctrine of individual "agency," the academy through the concept of individual academic freedom.

1. INDIVIDUAL AGENCY: The Church teaches that "moral agency" (which encompasses freedom and accountability) is basic to the nature and purpose of mortality (see 2 Ne 2:26, D&C 93:30-31; D&C 101:77-78). In LDS theology, individual freedom is essential to intellectual and spiritual growth. Every Latter-day Saint is enjoined to know truth for himself or herself. We claim it as our privilege to seek wisdom, like the Prophet Joseph Smith, for ourselves. Teachers and institutions play a crucial role in making truth available and discoverable. But neither testimony, nor righteousness, nor genuine understanding is possible unless it is freely discovered and voluntarily embraced.

2. INDIVIDUAL ACADEMIC FREEDOM: Perhaps no condition is as important to creating a university as is the freedom of the individual faculty member "to teach and research without interference,"[5] to ask

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hard questions, to subject answers to rigorous examination, and to engage in scholarship and creative work. The academy depends on untrammelled inquiry to discover, test, and transmit knowledge. This includes the traditional right to publish or present the results of original research in the reputable scholarly literature and professional conferences of one's academic discipline. Although all universities place some restraints on individual academic freedom, every institution that qualifies for the title of university allows ample room for genuine exploration of diverse ideas.

3. INTEGRATION OF INDIVIDUAL AGENCY AND ACADEMIC FREEDOM: Latter-day Saint scholars are thus doubly engaged to learn truth for themselves because both the Church and the academy bid them undertake a personal quest for knowledge. BYU aspires to be a host for this integrated search for truth by offering a unique enclave of inquiry, where teachers and students may seek learning "by study and also by faith" (D&C 88:118; cf. "The Mission of Brigham Young University").

4. SCOPE OF INTEGRATION: Because the gospel encompasses all truth and affirms the full range of human modes of knowing, the scope of integration for LDS scholars is, in principle, as wide as truth itself. Brigham Young eloquently articulated this gospel-based aspiration, proclaiming

> it is our duty and calling . . . to reject every error . . . to gather up all the truths in the world pertaining to life and salvation, to the gospel we preach . . . to the sciences, and to philosophy, wherever it may be found in every nation, kindred, tongue, and people.[6]

Similarly, modern revelation instructs Latter-day Saints to learn:

> Of things both in heaven and in the earth, and under the earth; things which have been, things which are, things which must shortly come to pass; things which are at home, things which are abroad; the wars and perplexities of the nations, and the judgments which are on the land; and a knowledge also of countries and of kingdoms. (D&C 88:79)

Further, Latter-day Saints believe, as an article of faith, "all that God has revealed, all that He does now reveal, and . . . that He will yet reveal many great and important things" (9th Article of Faith), and they are encouraged to use all their faculties--including heart, mind, and spirit--in their quest for truth (cf. D&C 4:2; 9:7-9).

5. SUMMARY: At BYU, individual academic freedom is based not only on a belief (shared by all universities) in the value of free inquiry, but also on the gospel principle that humans are moral agents who should seek knowledge in the sacred as well as in the secular, by the heart and spirit as well as by the mind, and in continuing revelation as well as in the written word of God. BYU students and their parents are entitled to expect an educational experience that reflects this aspiration.

B. INSTITUTIONAL ACADEMIC FREEDOM:

1. BYU'S MISSION: BYU has always defined itself as an openly and distinctively LDS university. BYU is wholly owned by the Church, which provides the University's principal source of funding from the tithing funds paid to the Church by its members. BYU draws its faculty and students principally from Church members. Everyone who works and studies at BYU subscribes to an Honor Code in order that the University may "provide a university education in an atmosphere consistent with the ideals and principles of the Church."[7] New faculty are interviewed by Church General Authorities as a condition of employment, and Church members are subsequently expected, as part of their university citizenship, to "live lives of loyalty to the restored gospel."[8] Faculty of other faiths agree to respect the LDS nature of the University and its mission, while the University in turn respects their religious convictions.

> Thus BYU defines itself as having a unique religious mission and as pursuing knowledge in a climate of belief. This model of education differs clearly and consciously from public university models that embody a separation of church and state. It is not expected that the

faculty will agree on every point of doctrine, much less on the issues in the academic disciplines that divide faculties in any university. It is expected, however, that a spirit of Christian charity and common faith in the gospel will unite even those with wide differences and that questions will be raised in ways that seek to strengthen rather than undermine faith. It is also expected that faculty members will be sensitive to the difference between matters that are appropriate for public discussion and those that are better discussed in private. In short, BYU defines itself as an intellectual community of faithful Latter-day Saints, and those sympathetic to their convictions, who pursue knowledge from the baseline of religious belief.

2. DEFINITION OF INSTITUTIONAL ACADEMIC FREEDOM: BYU claims the right to maintain this identity by the appropriate exercise of its institutional academic freedom. "Institutional academic freedom" is the term used to express the privilege of universities to pursue their distinctive missions. This concept harks back to well established early definitions of academic freedom that sought to guarantee institutional autonomy. The concept of institutional academic freedom is tacitly sanctioned in AAUP and NASC limitation clauses referred to in the Preface. It is also implicit in principles and practices of other church-related universities.[9] BYU likewise affirms that its relationship to The Church of Jesus Christ of Latter-day Saints is essential to its unique institutional identity.[10]

3. BENEFITS OF INSTITUTIONAL FREEDOM: The religious university constitutes an endangered species in today's academic ecosystem.[11] To force religious institutions to comply with narrowly secular definitions of academic freedom is to further imperil the survival of these distinctive intellectual communities. There are at least three reasons why the institutional academic freedom of religious institutions should be protected: to maintain institutional pluralism, to be consistent with the antidogmatic principles of academic freedom, and to safeguard religious freedom.[12] Each argument is sufficiently important to bear brief summary:

*Pluralism: Religious colleges and universities contribute to our diverse "ethical, cultural, and intellectual life."[13] Few enough to pose no threat of sectarian domination, religious institutions provide important alternatives to prevailing secular modes of thought. This "makes them better able to resist the popular currents of majoritarian culture and thus to preserve the seeds of dissent and alternative understandings that may later be welcomed by the wider society."[14] Furthermore, to impose a definition of academic freedom that disallows creedal and philosophical considerations "is to randomize every faculty with respect to creed and philosophy. This increases diversity within each faculty, but it eliminates the diversity among faculties."[15]

*Antidogmatism: Academic freedom is grounded in the Enlightenment's opposition to dogmatism; it presupposes that truth is discovered not through revelation but rationally, through the "clash of competitive ideas." "But this idea, too, must be subject to testing."[16] Historically, the most thorough challenge to narrowly rationalist methodologies has come from religion. Religion offers venerable alternative theories of knowledge by presupposing that truth is eternal, that it is only partly knowable through reason alone, and that human reason must be tested against divine revelation. President J. Reuben Clark, Jr., stated that one "cannot rationalize the things of the spirit, because first, the things of the spirit are not sufficiently known and comprehended, and secondly, because finite mind and reason cannot comprehend nor explain infinite wisdom and ultimate truth."[17] It is simply inconsistent with the antidogmatic principles of academic freedom not to permit its own premises about knowledge to be tested against such claims as these. "It is important that a principle born of opposition to dogmatism not itself become dogmatic and authoritarian."[18]

*Religious Freedom: Religiously distinctive colleges and universities are "an important means by which religious faiths can preserve and transmit their teachings from one generation to the next, particularly nonmainstream religions whose differences from the predominant academic

culture are so substantial that they risk annihilation if they cannot retain a degree of separation."[19] This right to religious freedom should "override whatever exiguous benefit to society might be achieved by forcing religiously distinctive institutions to conform to secular academic freedom."[20]

4. ABUSES OF INSTITUTIONAL FREEDOM: Institutional academic freedom, important for any college or university, is indispensable for institutions with distinct religious missions. Nevertheless, institutional freedom is a prerogative that, if regarded as absolute, would invite abuse. Therefore, academic freedom must include not only the institution's freedom to claim a religious identity but also the individual's freedom to ask genuine, even difficult questions. Learning can be unsettling. There is no such thing as risk-free genuine education, just as according to LDS theology there is no risk-free earthly experience. At any religious university, including at BYU, there always will be the possibility of friction between individual and institutional academic freedom.

There is no way to eliminate these tensions altogether, except by eliminating the claims of one kind of freedom or the other. But to do so would result in a net loss to the Church, the University, and to the family of universities to which BYU belongs. To eliminate BYU's right to define and preserve its institutional identity would threaten to transform BYU into a university like any other. At the same time, to override the very concept of individual academic freedom would threaten the vitality of BYU as a university. Either move would lessen the value of BYU to its faculty and students, to the Church, and to the academic community at large. Therefore, the task is to establish principles and procedures that help minimize conflict and that guide the Board of Trustees, faculty, and administration through differences that may arise.

II. RELATIONSHIP BETWEEN INDIVIDUAL AND INSTITUTIONAL ACADEMIC FREEDOM:

A. NEITHER FREEDOM IS UNLIMITED: Neither individual nor institutional academic freedom can be unlimited. The reasons for this have been suggested already. To elaborate:

1. LIMITS ON INDIVIDUAL ACADEMIC FREEDOM: There can be no unlimited individual academic freedom. Were there no constraints on individual academic freedom, religious universities could converge toward a secular model and lose their distinctive character, thus diminishing pluralism in academia. Furthermore, absolute individual freedom would place the individual faculty member effectively in charge of defining institutional purpose, thereby infringing on prerogatives that traditionally belong to boards, administrations, and faculty councils. Such arrogation of authority is particularly intolerable when the disagreement concerns Church doctrine, on which BYU's Board of Trustees claims the right to convey prophetic counsel. Yet even secular universities, whose boards claim no special religious authority, do not empower individual faculty members with absolute individual freedom relative to the University mission. For example, universities have censured professors for racist, anti-Semitic, or otherwise offensive expression. In addition, state universities have prohibited the advocacy of religious values to protect a separation of church and state. Every university places some limitations on individual academic freedom.[21]

2. LIMITS ON INSTITUTIONAL ACADEMIC FREEDOM: Neither can there be unlimited institutional academic freedom. If institutional freedom were limitless, BYU could cease to be a genuine university, devoid of the exploratory environment vital to intellectual endeavor and with little room for disagreement and questioning. At BYU, the Church enjoys a special, deeply appreciated relation to the University, but its relation is not simply that of employer to employee--for a university faculty constitutes a special kind of employee. While each faculty member is fully accountable to the University, he or she also works in a space that is open to inquiry, discovery, and discussion. Any limitations in this space must be narrowly drawn so as not to impede the robust interchange of ideas, because the Board and administration wish to set policy for an institution that legitimately may be called a university.

B. REASONABLE LIMITATIONS: It follows that the exercise of individual and institutional academic freedom must

be a matter of reasonable limitations. In general, at BYU a limitation is reasonable when the faculty behavior or expression seriously and adversely affects the University mission or the Church.[22] Examples would include expression with students or in public that:

1. contradicts or opposes, rather than analyzes or discusses, fundamental Church doctrine or policy;
2. deliberately attacks or derides the Church or its general leaders; or
3. violates the Honor Code because the expression is dishonest, illegal, unchaste, profane, or unduly disrespectful of others.

Reasonable limits are based on careful consideration of what lies at the heart of the interests of the Church and the mission of the University. A faculty member shall not be found in violation of the academic freedom standards unless the faculty member can fairly be considered aware that the expression violates the standards.

These principles shall be interpreted and applied with persuasion, gentleness, meekness, kindness, and love unfeigned--in the spirit of D&C 121:41-44--and through established procedures that include faculty review. The ultimate responsibility to determine harm to the University mission or the Church, however, remains vested in the University's governing bodies--including the University president and central administration and, finally, the Board of Trustees.

C. SYNTHESIS: Reasonable limitations mediate the competing claims of individual and institutional academic freedom. In practice, instances in which limitations are invoked against individual faculty conduct or expression are few and infrequent. This is because:

1. INDIVIDUAL ACADEMIC FREEDOM IS PRESUMPTIVE, WHILE INSTITUTIONAL INTERVENTION IS EXCEPTIONAL: Individual freedom of expression is broad, presumptive, and essentially unrestrained except for matters that seriously and adversely affect the University mission or the Church. By contrast, institutional intervention is exceptional and limited to cases the University's governing bodies deem to offer compelling threats to BYU's mission or the Church. The Board and administration most effectively exercise their freedom to preserve BYU's institutional identity by setting general policies.

2. UNIVERSITY POSTURE IS ONE OF TRUST: The faculty is entrusted with broad individual academic freedom to pursue truth according to the methodologies and assumptions that characterize scholarship in various disciplines. This trust necessarily encompasses the freedom to discuss and advocate controversial and unpopular ideas. However, the Board and administration reserve the right to designate, in exceptional cases, restrictions upon expression and behavior that, in their judgment, seriously and adversely affect BYU's mission or the Church.

3. FACULTY POSTURE IS ONE OF LOYALTY: Faculty members, for their part, agree to be loyal university citizens according to the guidelines set forth in the BYU Handbook. It is expected that the faculty will strive to contribute to the unique mission of BYU. This expectation, which aims at the fulfillment of University aspirations rather than merely at the absence of serious harm, properly figures in advancement and continuing status decisions.

4. TONE OF THE BYU COMMUNITY IS CHARITABLE: The faculty, administration, and the Board should work together in a spirit of love, trust, and goodwill. The faculty rightly assumes its work is presumptively free from restraint, but at the same time it assumes an obligation of dealing with sensitive issues sensitively and with a civility that becomes believers. BYU rightly expects LDS faculty to be faithful to, and other faculty to be respectful of, the Church and BYU's mission. Thus both the University's governing bodies and the faculty obligate themselves to use their respective academic freedom responsibly, within the context of a commitment to the gospel. As Elder B. H. Roberts said, "In essentials let there be unity; in non-essentials, liberty; and in all things, charity."[23]

CONCLUSION: It is the intent of Brigham Young University to reaffirm hereby its identity as a unique kind of university--an LDS university. BYU intends to nourish a community of believing scholars, where students and

teachers, guided by the gospel, freely join together to seek truth in charity and virtue. For those who embrace the gospel, BYU offers a far richer and more complete kind of academic freedom than is possible in secular universities because to seek knowledge in the light of revealed truth is, for believers, to be free indeed.

ENDNOTES

[1] See the Mission of Brigham Young University in the BYU General Bulletin or University Electronic Handbook.

[2] Both the American Association of University Professors (AAUP) and the Northwest Association of Schools and Colleges (NASC) have traditionally provided for special treatment of academic freedom issues in religious institutions, whose existence contributes to genuine pluralism in an overwhelmingly secular modern academia. The AAUP's "1940 Statement of Principles on Academic Freedom and Tenure" provides that "limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of appointment" (AAUP Policy Documents & Reports [Washington, D.C.: AAUP, 1990], 3). Similarly, the NASC Accreditation Handbook "allows `reasonable limitations on freedom of inquiry or expression which are dictated by institutional purpose' as long as they are `published candidly'" (1988 ed.), 9-10; see also 133.

[3] See Michael W. McConnell, "Academic Freedom in Religious Colleges and Universities," Law and Contemporary Problems 53.3 (1990): 303-24; David M. Rabban, "A Functional Analysis of `Individual' and `Institutional' Academic Freedom under the First Amendment," Law and Contemporary Problems 53.3 (1990): 227-301.

[4] McConnell, "Academic Freedom," 305.

[5] Ibid.

[6] Journal of Discourses, (Liverpool: Amasa Lyman, 1860), 7:283-84.

[7] See policy on Honor Code, University Electronic Handbook.

[8] Faculty Rank and Status: Professorial Policy, Policy and Procedures Section, University Electronic Handbook (rev. 1 June 1992), sec. 3.0.

[9] For example, the Catholic church's major statement on academic freedom in Catholic universities, Ex Corde Ecclesiae, affirms, among other things, that "every Catholic university, without ceasing to be a university, has a relationship to the church that is essential to its institutional identity" (John Paul II, "Apostolic Constitution on Catholic Universities [Ex Corde Ecclesiae]," paragraph 27 [1990]).

[10] For a discussion of "The Greater Institutional Academic Freedom of Private Universities," see Rabban, "A Functional Analysis," 266-71.

[11] See, for example, several articles appearing in First Things: James Nuechterlein, "The Death of Religious Higher Education" (January 1991): 7-8; George M. Marsden, "The Soul of the American University" (January 1991): 34-47; James Tunstead Burtchaell, "The Decline and Fall of the Christian College" (April 1991): 16-29 and (May 1991): 30-38; David W. Lutz, "Can Notre Dame Be Saved" (January 1992): 35-40.

[12] See McConnell, "Academic Freedom," 311-18.

[13] Ibid., 312.

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[14] Ibid.

[15] Ibid., 313. Similarly, Rabban argues that private universities may be granted greater latitude to establish educational policies than state institutions because "The resulting pluralism within the academic world . . . may provide more tolerance for diverse and unpopular views than a rule that would subject all universities to the commitment to diversity of thought that the first amendment imposes on public ones" ("A Functional Analysis," 268-69).

[16] McConnell, "Academic Freedom," 313.

[17] J. Reuben Clark, Jr., "The Charted Course of the Church in Education," in Messages of the First Presidency, ed. James R. Clark (Salt Lake City: Bookcraft, 1975), 6:49.

[18] McConnell, "Academic Freedom," 314.

[19] Ibid., 316.

[20] Ibid.

[21] As George S. Worgul, Jr., states in the "Editor's Preface" to Issues in Academic Freedom (Pittsburgh: Duquesne Univ. Press, 1992): "'academic freedom' at any university--whether public, private, church-related or church-sponsored--is never unlimited or absolute. Every university has an identity and mission to which it must adhere. . . . Freedom is always a situated freedom and a responsible freedom" (viii-ix).

[22] This document does not address policies, common to all universities, that govern the orderly maintenance of the institution, the disruption of classes, or the university endorsement of personal actions. This document speaks only to limitations arising from BYU's mission.

[23] Conference Reports, Oct. 1912, 30. The source of Roberts's citation is the Latin maxim, "In necessariis unitas, in non-necessariis (or, dubiis) libertas, in utrisque (or, ominibus) caritas" (see Philip Schaff, History of the Christian Church, 2nd ed. [New York: Scribners, 1915], 6:650-53).

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How Random and Suspicionless May School Searches Be: Doubting *Joy v. Penn-Harris-Madison School Corporation*

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I. INTRODUCTION

School districts' responses to the problems posed by student drug use place difficulties and limitations on the ability of schools to educate children.[1] Recently, random suspicionless drug testing of students who participate in specific activities has gained popularity. This has raised concerns about the potential for violation of the fourth amendment rights of students.[2] The concern stems from the expansion of schools' ability to violate student privacy rights.

In the recent case of *Joy v. Penn-Harris-Madison School Corporation*[3] (*Joy*), the 7th circuit dealt with the issue of whether or not the Supreme Court's tests in *T.L.O.*[4] and *Veronia*[5] were properly used in the school's decision to use random suspicionless drug testing of student drivers and others who participate in non-athletic extra-curricular activities.

In the cases that follow the dispute is never whether or not a student may be searched or drug tested by the school if the school has probable cause based upon individual suspicion or if the school has obtained a warrant. The cases do not argue the permissibility of schools' drug testing students on the basis of individualized suspicion alone. The issue presented in this case is whether or not students may be classified for the purpose of drug testing by the types of activities they participate in at school, without either suspicion of individual conduct or probable cause. In other words, is it permissible for schools to test students for drug use based solely upon the fact that they participate in extra-curricular activities?

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[1] Charles J. Russon and David L. Gregory, "Legal and Ethical Issues Surrounding Drug Testing In Schools." 1999 Det. C. L. Rev. 611 (Fall 1999). (cite studies done about levels of drug use).

[2] The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, or things to be seized. U.S. Const. amend IV.

[3] 212 F.3d 1052 (7th Cir. 2000).

[4] 469 U.S. 325 (1985).

[5] 515 U.S. 646 (1995).

A. JOY

In *Joy*, the seventh circuit reviewed an appeal by several students who sued their school district for due process violations. The school had enacted a random drug, alcohol and nicotine testing policy for all students who participate in extracurricular activities, drive to school, volunteer to be part of the random pool, are suspended from the school for three consecutive days before they can come back to classes, and all students for whom there was a reasonable suspicion of being under the influence of drugs and alcohol. Joy and the other plaintiffs attacked the merits of the first two grounds: students who participate in non-athletic extracurricular activities and students who drive to school.

The Seventh Circuit upheld all but the nicotine testing in a decision that is notable because the decision departs from established policy. The school's suspicionless drug testing policy was upheld even though the school district failed to meet the test laid out by the Supreme Court, had a poorly outlined policy, and its counsel admitted that his goal was to require all high school students to undergo suspicionless drug testing. Had it not been for *stare decisis* based upon the 7th Circuit's previous decision in *Todd v. Rush County Schools*,[6] the panel stated it would have invalidated the school district's policy because it violated students' fourth amendment rights.[7]

B. WHAT THE PAPER WILL DO

This paper explores the questions surrounding the *Joy* decision and examines the background and analytical framework which made the decision upholding random suspicionless drug testing possible. To accomplish this task, this paper will analyze the precedent set by the Supreme Court's and the 7th Circuit's legal decisions and show how they have consistently held

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[6] 133 F.3d 984 (7th Cir. 1998).
[7] *Joy*, 212 F.3d at 1066.

that students rights under the fourth amendment are limited. This paper will then examine some of the underlying policy considerations behind these decisions, namely: the impact of random drug testing upon the value of extra-curricular activities, the effects of this decision upon the police powers of school districts, and whether the justification of protecting student health and welfare is sufficient for intruding upon student privacy. Finally, this paper will examine how a school district would properly implement a constitutional suspicionless, random drug program.

III. BACKGROUND

Joy relied primarily upon two Supreme Court cases, *New Jersey v. T.L.O.*[8] (*T.L.O.*) and *Veronia School District 47J v. Acton*[9] (*Veronia*), as well as a couple of previous 7th Circuit cases for its decision. Because *Joy* relied upon the precedent of these cases in spite of what the court apparently wished to do, namely overturn the drug policy, it would be useful to review the tests proffered by the Supreme Court and the 7th Circuit in determining whether a school district has appropriately applied the fourth amendment to its students.

A. SUPREME COURT CASES

1. NEW JERSEY v. T.L.O.

The first case dealing with the rights of school districts to search students for drugs came in the 1985 case, *New Jersey v. T.L.O.*[10] This case arose when a female student who had been caught smoking in a bathroom had her purse searched by the assistant principal after she flatly denied smoking. The Assistant Principal found not only a pack of cigarettes, but also rolling papers, a small amount of marijuana, a pipe, several empty plastic bags, cash, a list of students

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[8] 469 U.S. 325 (1985)
[9] 515 U.S. 646 (1995).
[10] *See supra* at note 8.

who owed her money for marijuana and two letters implicating her in drug dealing. After the police and her mother were called, T.L.O. admitted to having dealt drugs.[11]

The Supreme Court had to decide whether "the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers."[12] The majority's decision held that while the principal conducted a search for the purposes of the fourth amendment, that search was "reasonable" upon the basis of a balancing test between the school's interest in a drug-free learning environment and the student's interest in privacy.[13] The Court emphasized that in certain cases it was not necessary for a search to have a warrant and that probable cause was not the only standard for an official of the state to conduct a search.[14] Even though the fourth amendment applies as a restraint of governmental intrusion upon students rights, a special needs exception exists when it is determined that individual suspicion and probable cause is "impracticable."[15] The court further explained that since the government has an obligation to fulfill the purpose of education[16], the need to instill discipline among the students is more pressing than ever. Widespread drug use has made this job much more difficult for school districts.[17] Hence, the special needs context of schools combating drug use requires for schools to have the ability to use reasonable flexibility in determining when it is appropriate to search

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[11] *See supra* note 8.
[12] *Id.* at 331.
[13] *Id.* at 343.
[14] *Id.* at 337. The court dictated the rule: "on the one side of the balance are arranged the individuals legitimate expectation of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order."
[15] *Id.*
[16] *Id.* at 334. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."
[17] *Id.* at 340. "...maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship."

students under the fourth amendment.[18] On the other side of the equation from the school's desire for stability and order, their police power, is the student's expectation of privacy. The court held that the fourth amendment did not protect a person's unreasonable or illegitimate expectations of privacy. The test determines the "balance the governmental and privacy interests to cases the practicality of the warrant and probable cause requirements in the particular context."[19]

The court rejected New Jersey's two arguments: that a student in public schools was more akin to a prisoner, and alternatively, had no need to bring personal belongings to school. It did, however, hold that the reasonable expectation of student privacy was diminished in the public school setting. The rule in T.L.O. was that the "finding of special need in T.L.O. meant that school officials could justify a search of a student upon reasonable and individualized suspicion "that the search [would] turn up evidence that the student has violated or is violating either the law or the rules of the school."[20]

Justice Stevens led a long and vigorous dissent from this opinion stating that students in a governmental institution deserved more than a reasonableness test to determine whether they can be searched for violation of school rules.[21] Unlike the majority, Stevens does not distinguish between students in public schools and the general public at large. The dissent argues despite whatever test the majority proposed that "the search of a young woman's purse by a school administrator is a serious invasion of her legitimate expectations of privacy."[22] In a moment that

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[18] *Id.* "It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." As such the court is hesitant to create rules which would, "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in schools."
[19] *Id.*
[20] *See Id.*
[21] *Id.* at 354. The sanction of "school officials to conduct full-scale searches on 'reasonableness' standard whose only definite content is that it is *not* the same test as the 'probable cause' standard found in the text of the Fourth Amendment." (italics in the text)
[22] *Id.* at 375.

sounds similar to Justice O'Connor's *Veronia* dissent[23] he states: "moved by whatever momentary evil has aroused their fears, officials – perhaps even supported by a majority of citizens – may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be left alone…"[24]

The problem with the majority's balancing test is that the difficulties experienced in securing a warrant "is not an unintended *result* of the Fourth Amendment's protection of privacy; rather, it is the very *purpose* for which the Amendment was thought necessary."[25] He further contends that the use of a balancing test in determining the limits of fourth amendment rights "finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens."[26] The balancing test really consists of a form of cost benefit analysis which the Constitution does not contemplate.[27] The court ends up overstating the social costs faced by the government while it under-weighs the need for fourth amendment protection by students.[28] Stevens finally concludes that the probable cause standard should be upheld even for students.[29]

2. VERONIA: THE SUPREME COURT PRECEDENT

Veronia continued where *T.L.O.* left off, applying "special needs" testing to the area of random drug testing of student athletes. The Veronia school district was at a loss as to what to

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[23] *See discussion infra.*
[24] *Id.* at 361.
[25] *Id.* at 357. (italics his)
[26] *Id.* at 358.
[27] *See Id.* at 362-369, where Justice Stevens undergoes an extensive treatment of the type of flexibility this rule provides for "costs" etc.
[28] *Id.* at 362.
[29] *Id* at 361. "Considerations of the deepest significance for the freedom of our citizens counsel strict adherence to the principle that no search may be conducted where the official is not in possession of probable cause – that is, where the official does not know the 'facts and circumstances [that] warrant a prudent man in believing that the offense has been committed.'" *Citing Henry v. United States*, 361 U.S., at 102 (1959)

do regarding an entrenched drug problem led by the student athletes. School district officials anecdotally had noticed that the numbers of kids using drugs had risen significantly, discipline had become worse, and profane language had become common during the 1980s. After a series of injuries involving athletes suspected of drug use, the District decided to actively respond to the problem through "special classes, speakers, and presentations designed to deter drug use."[30] When this initial program failed, the District decided to implement a drug-testing program. The plan was formulated and presented to parents. The "Student Athlete Drug Policy" was approved stating that its "expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs."[31]

Everyone who wished to participate on an athletic team was required to have their parents sign a consent form permitting drug testing. At the beginning of the season, the athletes were tested. The student's names were then placed into a pool from which a student, with two adults, would draw the names of 10% of the athletes. The student athlete would be drug tested that day. The tests were administered in the locker rooms and searched specifically for controlled substances. When a student tested positive, a second test was taken. If the second test was negative, then there was no further action. If the test was positive a second time, then the parents were notified and the student would have to decide whether or not they would go into a six week drug assistance program, or be suspended for the rest of the season. A second offense would automatically suspend the student from playing sports the rest of the season. Finally, a third offense would suspend the athlete from the rest of the present season and the next two athletic seasons.[32]

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[30] *See supra* note 9.
[31] *Id.* at 650.
[32] *Id.* at 651.

The Court's analysis began similarly to the analysis in *T.L.O.*, with the explanation that the fourth and fourteenth amendments were placed to protect the citizenry of the people from unreasonable searches and seizures.[33] This protection includes both schools and drug testing.[34] The court qualified this by stating that a person's fourth amendment rights are not absolute "the ultimate measure of the constitutionality of a governmental search is reasonableness."[35] The Court then acknowledged that when a search is conducted by the government, generally a judicial warrant and probable cause are required. There are times, however, when under the special needs doctrine the government does not require a warrant to perform a search. Hence, the court developed a balancing test where it "engages in a balancing test between the "intrusion on the individual's Fourth Amendment interests" and the search's promotion of legitimate governmental interests.[36] The Court determined, because of its holding in *T.L.O.*, that public schools fell into the category of "special needs" cases.

Unlike *T.L.O.*, however, the Supreme Court developed a five prong test to determine whether or not the government may reasonably conduct a search without a warrant. The court first examined the nature of the privacy interest. Because minors are in the custody of the school, they are limited in their privacy interests in general. Athletes especially have a limited privacy interest because of the "communal nature of their undress."[37] The government must

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[33] *Id.* at 652
[34] *Id.*
[35] *Id.*
[36] *Id.* at 653, *Joy* at 1058-9.
[37] *See Veronia* at 657. This characterization presents its own troubling legal question. Does the fact that a school provides only 'communal' changing facilities determine that the fourth amendment privacy protections have lost some of their meaning? What if schools paid for locker rooms with private or semi-private lockers? Would those student athletes have the same problems as Veronia? It seems that this justification is a weak one. One commentator has noted This concept of a lower expectation of privacy for students participating in extracurricular activities is not universally accepted. "Certainly there is no remarkable element of communal undress present for participants in the Library Club or Future Farmers of America. The court of appeals comes distressingly close to authorizing blanket, random, suspicionless searches of all public school students based upon the lesser expectation of privacy held by students in general." J. Nathan Jensen. "Notes & Comments: Don't Rush to Abandon a Suspicion-Based Standard for Searches of public school students." B.Y.U.L. Rev. 695, 705 (2000).

secondly determine the character of the intrusion on the individual's privacy interest. Because the drug testing process was "nearly identical to conditions encountered in public restrooms" the court concluded that the impairment of student's privacy rights was reasonable.[38] This view was bolstered by the fact that the information was "not disclosed to law enforcement personnel and was provided to only a limited number of school personnel."[39] The third prong is the nature of the governmental concern at issue. As the court in *Joy* pointed out: "deterring drug use by schoolchildren was obviously important especially given that 'school years are the time when the physical, psychological, and addictive effects of drugs are most severe.'"[40] The court stated that drug use by students affects the whole student body because it disrupts the educational process.[41] The Supreme Court noted that the lower courts required that the school district show a "compelling need" for the drug testing in order to eliminate the requirement of individualized suspicion of students.[42] This was met, however, because the government was able to show that its interest was "*important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."[43] The fourth prong is the immediacy of the concern. The Court weighed this prong and came to the conclusion that "athletes are particularly subject to risk from drug use because of the physical harm to the individual or to his peers that may result from the use of drugs."[44] The *Veronia* court highlighted evidence showing that drug use negatively impacts student athletes in several ways: "psychological judgment, slower reaction time, and a lessening of the perception of pain, and the

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[38] *Joy* at 1059. It would seem that there is a difference between urinating without anyone monitoring your behavior and the scrutiny one's behavior is under during urinalysis. It appears again that the court is stretching. The situation is the same; however, the context is very different. Further, the courts do not consider a legal privacy interest in one's biological byproducts, perhaps because these cases fall under the "special needs" exception.
[39] *Id.* at 1059.
[40] *Id.* at 661.
[41] *Id.* at 1060.
[42] *Veronia* at 661.
[43] *Id.* (Italics his).
[44] *Id.* at 662

physical risks of drugs to athletes, such as increased heart rate, higher blood pressure, and masking of normal fatigue."[45] Based upon examination of these five prongs, the court held that all the government needed was substantial reasonableness and it could randomly drug tests student athletes without suspicion.

Justice O'Connor, however, did not agree with the majority's elaborate balancing test.[46] She mused: "millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school are open to an intrusive bodily search."[47]

She argued that suspicionless drug testing was not justified on the facts, because it was not clear that a suspicion based regime would not work. The court's reasonableness test "treats a suspicion-based regime as if it were just any run-of-the-mill, less intrusive alternative…an alternative that officials may by-pass if the lesser intrusion…is outweighed by policy concerns unrelated to practicality."[48] Reasonableness should mean reasonable suspicion not some sort of balancing. This should be especially true since the court never really goes into whether a suspicion based program is practical. The Fourth Amendment places a limitation, enacting a price on governments ability to monitor the behavior of its citizens even in situations as involving a compelling government interest like fighting drugs, which is traditionally not a part of school's function.[49]

O'Connor goes further, stating that the majority's decision effectively espoused a policy allowing for blanket searches of students.[50] The decision is fundamentally unconstitutional

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[45] *See Id.*
[46] Justice O'Connor was joined by Justices Stevens and Souter in this decision.
[47] *Id.* at 667.
[48] *Id.* at 676.
[49] *Id.* at 680.
[50] *Id.* at 680. "The instant case, however, asks whether the Fourth Amendment is even more lenient than that, i.e., whether it is so lenient that students may be deprived of the Fourth Amendment's only remaining, and most basic,

because it can undermines the very nature of the Fourth Amendment. "Blanket searches, because they can involved 'thousands or millions' of searches, 'pose a greater threat to liberty' than do suspicion-based ones, which 'affect one person at a time."[51] Judges should not be in the business of determining what has up until *Veronia* been "considered *per se* unreasonable within the meaning of the 4th amendment."[52] A reasonableness test violates the Framers' hard-fought battle to contain the ability of government to generally search its citizens, individuals as well as groups.

Third, O'Connor suggests instead an alternative procedure that would address the school district's need for a policy that combats drugs and still maintain the individual suspicion requirement.[53] She suggests that the school should focus on students who violate rules against severe disruption on and around campuses, by adopting a policy which relies upon students who violate school rules. This policy accomplishes two things: it limits the number of students tested and gives students control over the likelihood that they would be tested through their behavior .[54] This creates needed limitations that only those who violate specific rules will be drug tested.

Fourth, she challenges the court's test itself by attempting to refute the court's justification for its multi-pronged test: "certainly monitored urination combined with urine testing is more intrusive than some personal searches we have said trigger Fourth Amendment protection in the past."[55] She additionally finds that the court's reliance upon physical examinations and vaccinations as poor justification for its holding because neither physical

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categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people."

[51] *Id.* at 667. *See Illinois v. Krull*, 480 U.S. 340, 365 (1987).

[52] *Id.*

[53] *Id.* Others disagree with this sentiment arguing that it would undermine the effectiveness of the school to deter drug use. These commentators fail to ask whether society wants to promote effectiveness. *See* John J. Bursch. "Note: The 4 R's of Drug Testing in Public School: Random Is Reasonable and Rights are Reduced." 80 Minn. L. Rev. 1221 (1996).

[54] *See Id.* at 685.

[55] *Id.* at 672.

examinations nor vaccinations are searches under the Fourth Amendment. "physical exams (and of course vaccinations) are not searches for conditions that reflect wrongdoing on the part of the student, and so are wholly nonaccusatory and have no consequences that can be regarded as punitive."[56] Additionally, as in *T.L.O.*, the dissent points out that the court overstates governmental concern of a suspicion-based program, "the district seems to have understated the extent to which such a program is less intrusive of student's privacy."[57] Finally, O'Connor echoes Steven's dissent in *T.L.O.* by concluding, "It cannot be too often stated that the greatest threats to our constitutional freedoms comes in times of crisis."[58]

B. 7th CIRCUIT CASES

1. ATHLETES AND CHEERLEADERS

Before *Veronia* was decided, the 7th Circuit had already determined that school district's may randomly drug test student athletes and cheerleaders in *Schaill v. Tippecanoe County School Corp* (*Schaill*).[59] The baseball coach had received information that several of the players on the team were using drugs. He ordered that his team undergo drug testing and found five of the 16 players tested positive for marijuana use.[60] These results led the school board to "institute a random urine testing program for interscholastic athletes and cheerleaders in the TSC school system."[61] The program required a signed consent form by both the student and one parent. If the student made the team, each athlete was assigned a number that was placed in a box. At different times during the season, the administrator would select a number from the box and the person chosen would be tested.[62] The student was taken to the restroom and unlike every other

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[56] *Id.* at 683.
[57] *Id.* at 678.
[58] *Id.* at 685. "But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights."

case, was allowed to fill the cup without visual monitoring. Certain checks ensured that the sample was authentic.[63]

This case arose when two students refused to participate in the schools random urinalysis program, claiming the test violated their fourth amendment due process rights.[64] The district court denied their claims for declaratory and injunctive relief.[65]

As other courts had done, the circuit panel determined that urinalysis testing was a fourth amendment search and that a person has a reasonable expectation of privacy when urinating.[66] The court determined that the school may not contract away a person's constitutional rights that it could not command directly.[67] Thus, the school's requirement that a student have a signed consent form before they could volunteer to play sports does not mean the school is in the clear.[68]

The court then considered the amount of suspicion requisite for urinalysis. Schaill argued for an individualized standard of probable cause.[69] The court, however, relied upon the balancing test used by the Supreme Court in previous cases.[70] Since *T.L.O.* stated that "the

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[59] 864 F.2d 1309 (7th Cir 1988).
[60] *Id.*
[61] *Id.*
[62] *Id.* at 1311.
[63] *Id.* If the student tested positive for drugs, they could have the remaining sample tested at the lab of their choice. Barring any innocent explanations, the school would suspend the student from participating in 30% of the varsity events for the remainder of the season. A second positive result would keep the player from participating in 50% of the varsity events for a remainder of the season. A third positive result suspended the student from playing varsity sports for a full calendar year, while a fourth one eliminated the student from playing on any sport team while they were in high school.
[64] *Id.* at 1310.
[65] *See Schaill v. Tippecanoe Cty. Sch. Corp.*, 679 F.Supp. 833 (N.D. Ind. 1988).
[66] *Schaill* at 1312. The court went on to say that society discusses such matters in only the most euphemistic forms.
[67] *Id.* at 1312-1313.
[68] *Id.*
[69] *Id.* at 1313.
[70] *Id.* To determine whether the government may grant a search requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests agains the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696 (1983).

warrant and probable cause requirements did not apply"[71] and imposed a reasonableness test, the panel relied upon that standard, refusing to narrow it because a stringent fourth amendment analysis would "unnecessarily intrude upon the purposes of the classroom or workplace."[72]

The court determined that there were many reasons why the school's attempt was reasonable.[73] In the end, though, the court seemed to rely upon several factors to justify their decision. First, the invasion of privacy was diminished due to the fact that the students were not watched during their test. Second, there is a diminished expectation of privacy respecting urinalysis for athletes due to the "element of 'communal undress' inherent in athletic participation."[74] Third, student athletes are subject to considerable regulation by the State High School Athletic Association requiring among other things, "minimum grade, residency and eligibility requirements…[as well as] training rules, including prohibitions on smoking, drinking and drug use both on and off school premises."[75] The combination of these factors meant "it is implausible that students competing for positions on an interscholastic athletic team would have strong expectations of privacy with respect to urine tests."[76]

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[71] *Id.* at 1314. James M. McCray argues for the continuation and logical extension of recent decisions to include all students in public schools. "Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities." 53 Vand. L. Rev. 387 (January 2000). (says schools still have an in parentis rights.)

[72] *Id.* The Supreme Court was concerned about requiring teachers to master the intricacies of fourth amendment requirements. Instead the Court imposed upon teachers a duty to use the dictates of reason and common sense. Yet, it would seem odd to think that the Bill of Rights was open to one's personal judgment, reason or common sense. This seems like a dubious standard through which one may have no standards.

[73] The court seemed to be uncomfortable with one legitimating this practice. It went on for pages ad nauseum with reason after reason why drug testing is good and right. Furthermore it included many reasons that were not in issue in this case. It is surprising to note the extent the court thoroughly exhumed just about every possible reason for justifying their decision.

[74] *Id.* at 1318.

[75] *Id.* This seems to be a false argument. The nature of grade requirements and prohibition on the use of drugs and alcohol are one thing, using methods that violate a student's privacy right is another. At least one commentator has claimed that *Veronia* and other decisions like *Schaill* permit suspicionless drug testing of all high school students and that this behavior should be encouraged. Bursch, *supra* note 53. (argues that athletes have no need for additional protection from schools because of other requirements make it akin to a heavily regulated industry).

[76] *Id.* at 1319. *See* Charles J. Russon and David L. Gregory, "Legal and Ethical Issues surrounding Drug testing in schools." 1999 Det. C. L. Rev. 619 (Fall 1999). (states that the court upheld the policy because "it was reasonable under the fourth amendment and that the district had sufficient procedures in place that safeguarded the rights of

2. EXTRA-CURRICULAR ACTIVITIES AND DRIVING.

The first 7th Circuit case to specifically deal with the issue of random suspicionless drug testing of students in extracurricular activities is *Todd v. Rush County Schools*.[77] This case upheld the Supreme Court's rule in *Veronia*, allowing a Rush County drug testing plan for students who drive and participate in extra-curricular activities. In this case, the school's drug testing policy required all students who desired to participate in extracurricular activities or planned to obtain a parking permit to consent to random drug, alcohol, and tobacco testing.[78] The school district initiated the testing policy after the Indiana Prevention Resource Center indicated, based upon a survey of students at the high school, that tobacco, alcohol and marijuana use was higher than average for various grades surveyed.[79] Because of the scope of the school district's new drug test, the policy virtually blanketed the entire school.[80]

The 7th Circuit relied upon the *Veronia* test and *Schaill* to uphold the drug testing policy on what can be best described on either *in parentis* or police power grounds.[81] The *Todd* court based its decision upon the responsibility a school district has "as guardian and tutor of children entrusted to its care."[82] The court highlighted that the purpose of the drug testing was to deter drug use and not to "catch criminals."[83] Unlike the previous cases, the court did not actually appear to weigh the reasonableness of Rush County's drug testing policy. Instead, the Circuit Court made its decision based upon several general policy concerns. The court held that participation in extra-curricular activities was a student privilege and drug testing was a cost for

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students. In an interesting, but realistic slant, the court also permitted testing based on its belief that since student athletes gain enhanced prestige in the school community, it was not unreasonable to require student athletes and cheerleaders to undergo drug testing.").

[77] 133 F.3d 984 (7th Cir. 1998).

[78] *Joy.* at 1061. *Todd* at 984.

[79] *Todd* at 985.

[80] *Id.* Of the 950 students who were in the high school, 170 did not participate in extracurricular activities.

[81] *Todd* at 986

[82] *Veronia*, 115 S. Ct. 2396.

[83] *Todd* at 986.

those who wished to volunteer to participate.[84] Second, the circuit panel held that all extra-curricular activities were sufficiently similar to athletics and cheerleading as to render them under the same "special needs" category as athletes.[85] Third, irrespective of the student activity, all "successful extracurricular activities require healthy students."[86] The health and welfare rationale was ultimately considered: "the lynchpin of [the] drug testing program is to protect the health of the students involved."[87] The court went further, however, by holding that students should not complain about the drug testing because they benefit from the "enhanced prestige and status in the student community."[88] In the end, the court decided, citing *Schaill*, that "if the schools are to survive and prosper, school administration must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment."[89]

IV. ANALYSIS

A. LEGAL

The *Joy* court relied heavily upon precedent in making its decision. It noted that under the fourth amendment, citizens are protected from "unreasonable searches by school officials."[90] Urinalysis is a search, and normally the government must have probable cause and a warrant unless the search falls under the category of "special needs."[91] At that point, the balancing test between the governmental and the privacy interests of the parties comes into play. The Court recognized that the nature of the school's concern was sufficiently similar to the concerns of

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[84] *Id.*
[85] *Id.*
[86] *Id.* This sentiment was echoed by the *Joy* court in its holding saying that schools can not operate without healthy students.
[87] *Id.* at 986. Some take a very generous view of this rational. However, it is not until recently that schools have been responsible for the health and welfare for students except for certain tort liability grounds. For a different view that is more generous to this line of thinking. *See* Russon and Gregory, *supra* note 76. ("since the board is responsible for the welfare of its students, it was justified in requiring drug testing of all participants in extracurricular activities.).
[88] *See id.*
[89] *Id. See Schaill, supra* note 59.
[90] *Joy* at 1058, citing *T.L.O.*
[91] *Id.*

schools in *Veronia* and *Todd*.[92] Courts have emphasized that school districts are not allowed to divide students into general groupings on a category-by-category basis.[93] Because of this, the *Joy* court did not believe that *Todd* was mandated by *Veronia*[94] and had *Todd* not been decided less than two years prior to *Joy*, "we would not sustain the random drug, alcohol, and nicotine testing of students seeking to participate in extracurricular activities."[95]

When the *Veronia* test is applied, the court makes clear that *Penn-Harris-Madison School Corporation* (PHS) failed to meet the requirements for random suspicionless drug testing. In spite of this, the court upheld the district's plan, except for the nicotine test, because of the precedent set in *Todd*.

The Court first examined the nature of the privacy interest of the students. The court followed the assumption of previous courts that students expect less privacy than the general public because "students are in the temporary custody of the school" and are subject to routine physical exams and vaccinations.[96] The court points out that unlike the athletes in *Veronia* and *Todd*, however, that students who are in extra-curricular activities and who drive to school "do not subject themselves to more explicit and routine loss of bodily privacy as a necessary component of their participating in the activities in question."[97] Thus, students in extra-curricular activities have higher expectations of privacy than athletes but, as the court points out, less than the general public.

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[92] *Id.*

[93] *Id.* at 1062. "The court cautioned against dividing students into broad categories and drug testing on a category-by-category basis because then 'all but the most withdrawn and uninvolved students [would] fall within a category that is subject to testing.'"

[94] *Id.*

[95] *Id.* at 1063. Please refer to note 9 in the decision where extra-curricular is defined specifically to mean only non-athletic activities.

[96] *Id.*

[97] *Id.* "Although PHM students in extracurricular activities, other than athletics, also volunteer to join a particular group and to subject themselves to the rules of that organization, those rules do not require the same surrender of physical privacy as required of the student athletes in Veronia. In the case of students driving to school, in contract is even more dark. "

The second *Veronia* factor is the character of the intrusion. Because the drug test was the same as the test in *Veronia*, the intrusion was deemed not overly intrusive.[98]

The third factor examined the nature of the governmental concern. The issue was "whether there is any correlation between the defined population and the abuse, and whether there is any correlation between the abuse and the government's interest in protecting life and property."[99] The difference between *Veronia*, *Todd* and *Joy* was that the schools in the first two cases presented evidence showing that drugs were a problem among the targeted students; the school Joy attended had not proved "or even attempted to prove, that a correlation exists between drug use and those who engage in extracurricular activities or drug use and those who drive to school."[100] The court admonished the school district for dividing students into broad categories and then testing them based on those categories,[101] a practice the 7th Circuit has previously warned schools against doing.

The fourth *Veronia* factor described the correlation between the alleged abuses and the governmental interest. While statistics provided by PHM indicated that drug usage by students were generally higher than normal, it was not explained by the school district how students involved in extra-curricular activities were any different in their ability to perform than other students.[102] PHM also failed to show that students who were involved in extra-curricular activities were in more danger than other students were. For students who drove to school, the court could find it plausible that "students driving vehicles on school property stems from the ability of one student under the influence of drugs or alcohol to injure seriously another

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[98] *Id.* at 1064.
[99] *Id.*
[100] *Id.*
[101] *Id.* The goal of course in this area of the law is that all students will eventually become subject to random drug testing in order to attend public schools as was admitted by the school district's attorney: "At oral argument, counsel announced that the goal is to test all students on a random, suspicionless basis."
[102] *Id.*

student."[103] The court, however, found that the school district had failed to provide evidence that showed "a correlation between drug use and students in extracurricular activities, or other evidence of a particularized special need, before implementing its suspicionless drug testing policy for those particular student groups."[104]

The final factor the court examined was the efficacy of the means. In both *Veronia,* and *Todd*, the courts held that random suspicionless drug testing was okay because it was "difficult to use individualized suspicion to drug test a broad population of students, such as athletes."[105] The *Joy* court emphasized that other cases have held that schools *should* use a suspicion based regime of drug testing, where there is no evidence of a drug problem by the targeted group.[106] The court said that there was no evidence to correlate drug usage and student extracurricular activities and student drivers: "PHM has made no showing that teachers, staff and sponsors of extracurricular activities would not be able to observe the students for suspicious behavior."[107] Thus, PHM failed this prong as well.

Based upon the factors outlined by the Supreme Court in *Veronia*, the circuit court held that PHM failed to properly justify its random drug testing plan for extra-curricular activities.[108] Despite this sentiment, the court upheld the decision upon precedent established in *Todd*: "we believe that we must adhere to the holding in *Todd* and affirm the district court's grant of summary judgment for the School as it related to testing students involved in extra-curricular

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[103] *Id.*
[104] *Id.* at 1065.
[105] *Id.*
[106] *Id. See also Chandler v. Miller,* 520 U.S. 305 (1997). "In *Chandler*, however, the Court stressed the suspicionless drug testing without evidence of a drug problem by the targeted group should not be used if suspicion-based drug testing is possible."
[107] *Id.*
[108] *Id* "With respect to random testing to those who participate in extracurricular activities, we believe that according to the methodology employed by the Supreme Court in Veronia, there has been inadequate showing that such an intrusion is justified." Also, "The judges of this panel believe that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity."

activities."[109] The court warned counsel not to take this too far, however, and expressed fears that schools were moving down a slippery scope in which all students will be randomly drug tested.

B. SOCIAL POLICY

While much has been written over the past few years either supporting or decrying the use of suspicionless drug testing for students, little ink has been spent examining the underlying policy factors given by courts for their decisions. It is fairly clear that courts have relied on two primary social policy justifications for their decisions. Since the following section of this paper attempts to outline principals that should guide a school board in determining whether or not to engage in this practice, it is useful to examine what social assumptions our society is buying into in order to sacrifice student Fourth Amendment Rights.

The first is the police power justification: "Because school-aged children are obligated to attend school, the nation's school districts assume a duty to protect them while at school."[110] The court further explained the role of school districts. "Public school students should feel and be safe at school. They should be free from violence by other students as well as from unreasonable invasions of privacy and regulations of individuality by school officials. The current state of constitutional law as applied in the school setting, however, seems to require one at the expense of the other."[111] With their expanded role of protectors and enforces, school districts risk public disapproval or outcry with they fail to successfully address student drug problem.[112] It was

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[109] *Id.* at 1066.

[110] Jennifer L. Barnes "Commentaries on Mark Tushnet's taking the constitution away from the courts: Comment: Students under Seige? Constitutional considerations for public schools concerned with school safety." 34 U. Rich. L. Rev. 621, 631 (May 2000).

[111] *Id.* at 645.

[112] Bernstein at 260. "The courts have reasoned that, in most situations, a school's safety and discipline needs largely outweigh a student's individual right to education, thus suggesting the pedagogical concerns qualify a student's right to attend school."

T.L.O. that announced that the fourth amendment applied to school officials.[113] The expansion of the *Veronia* standard to include students in extracurricular activities as outlined in *Todd* and *Joy* indicate that those limits do not mean very much.

With the advent of suspicionless random drug testing, society has expanded the police power given to schools. This is different from the ability to suspend or evict students from school grounds. The ability to give drug tests as are now being contemplated have heretofore been reserved for more formal enforcement structures in an environment of more significantly diminished constitutional rights.[114] This is a significant enhancement of the school district's role, power and responsibility, and carries with it the implicit threat of even further encroachment upon students' constitutional rights.

The second underlying social assumption is the need for the promotion of the health and welfare of public school students. All the cited cases use this as grounds for upholding the drug testing policy. This is extraneous to the responsibility of schools to educate, and further has not been argued to be a tool to avoid school district tort liability. No, this assumption raises the idea that schools are attempting to provide more hositic services and to be an environment where children are molded into upstanding adults. This is a situation where modern social science seems to come into conflict with the law. It is believed that with the correct curriculum, the right incentive packages, and the right amount of funding as well as other things that schools are often asking for, that the school district can stitch up the holes in other areas of students' societal fabric.

As a result, schools take on the responsibility to provide meals, before school activities, after school activities, and everything in between to help students "make it." The question that

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[113] *See also* J. Nathan Jensen. "Notes & Comments: Don't Rush to Abandon a Suspicion-Based Standard for Searches of public school students." B.Y.U.L. Rev. 695 (2000).
[114] i.e. a probation officer may use random suspicionless drug testing as an appropriate tool for drug offenders.

needs to be asked is what are the limits of a state sponsored educational process?[115] For already overburdened schools, at some point something simply has to give. From a policy perspective, it appears that in order for a school to function properly it must limit its primary responsibility to teaching instead of attempting to take on a full service social services role.

In the end, schools having must take on and clean up all of society's ills, almost none of which they are responsible for. This is perhaps ultimately what the Supreme Court set in motion when it undertook to desegregate schools in *Brown v. Board of Education of Topeka Kansas*.[116] Schools have become ground zero for resolving the issues adults do not want to deal with. At what point is the question asked, what is the purpose of public education for my child? What role does and should my child's school play in my child's social and cognitive development? What activities are most important for a child to have when they attend elementary school, junior high and high school? The answers to these questions need to be answered by parents. They need to be modified and answered by school board superintendents, principals and school boards. Teachers need to examine their purpose for being teachers.

The biggest question society should begin asking is this: when are the marginal costs for administering a certain program in the public schools outweighing the marginal benefits? Or more specifically, what largess from school activities are better suited to other governmental or private interests within the local community? While some argue that public schools themselves should be dramatically altered, perhaps the real problem is merely that schools have lost focus on

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[115] *See* Michelle A. Bernstein "Case Comment: Constitutional Law—Massachusetts does not Guarantee Fundamental Right to Education—Doe v. Superintendent of Schools, 421 Mass. 117, 653 N.E.2d 1088 (1995)" 30 Suffolk U. L. Rev. 257 (1996). (Bernstein discusses a recent Massachusetts case holding that there is no fundamental right to an education. She notes how other states have made similar decisions in Georgia, Connecticut, Rhode Island, North Dakota, Colorado, Massachusetts, and California." pg. 263.)

[116] This paper does not take a stance on the *Brown*, which has been extensively argued about since its decision. The author merely points out that prior to Brown, schools were largely free to educate. Since Brown this has changed. Courts and the Federal Government have politicized the lives of children and made schools the focal point for many political battles.

their primary goal: to educate young people in a discrete set of skills in preparation for adulthood.[117]

If school districts feel that in order to provide a satisfactory extra-curricular program they need to resort to random drug testing, perhaps the time has come for a shift in policy. Instead of remaining more concerned about school-provided extracurricular activities and the well roundedness of our students' resumes than whether they can read, write or do arithmetic. Perhaps local governments and school districts could formulate plans to shift the burden of extra-curricular activities from the school house to a broader public sphere.[118]

V. WHAT IS A SCHOOL DISTRICT TO DO?

If a school district is concerned about the level of drugs and its ability to help prevent students from harming themselves from drugs, the following guiding principles may help a school district formulate a plan.[119]

First, conduct an assessment. Determine whether there really is a drug problem in the school district. This may help school districts determine what sort of remedies are necessary for their own individual situations. Use a survey or other scientific means to discover what percentages of students in the school district are using drugs and the type of drugs that are being used. Attempt to determine whether a correlation exists between levels of drug usage and the types of activity students are participating in. During the assessment, make sure that the five *Veronia* factors are appropriately answered:

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[117] One could easily argue that schools do just that today. The problem is that public schools should only play one part of a student's life. Other skill sets are learned in the home, through interaction with other facets of government, and in church and non school related extracurricular activities.

[118] Schools could also spin off athletic programs, turning them over to city or private leagues. Schools, meanwhile, could use the money they save on classroom materials, teacher salaries, or even retire school bonds early.

[119] This should be taken as a specific plan. This section's purpose is to highlight the underlying considerations that should go into the determination of how to proceed with developing a plan. Two law review articles that offer excellent nuts and bolts specifics on specific planning procedures are: Bursch, *supra* note 53 (provides what he views as a model resolution for a school drug testing policy) and Russon and Gregory, *supra* note 76. Also consider Justice O'Connor's dissent in *Veronia*.

- What is the nature of the privacy interest?
- What will be the character of the intrusion?
- What is the nature of the government's concern?
- What is the immediacy of the government's concern?
- What is the efficacy of the means?

Second, during the period where an assessment is being made, use what courts normally describe as "less intrusive means" to fight the drug problem by providing seminars, required workshops, classes, videos, and other sorts of training to warn students and their parents from using drugs and alcohol. See what effect this has on the level of drug usage in the school, or in the school district. Develop a file of anecdotal material of stories where students became involved with drugs and the tragedies that befell them.

Third, if random drug testing is determined to be necessary, focus on the group of students who are most "at risk" of damaging their health and welfare. Have a meeting with the parents of the students and, prior to implementation of the policy receive their input and suggestions. Parents seem to be concerned about the safety of their children and frequently go along with good faith efforts of schools to help children.

The following factors should be considered in developing a plan:

- Narrowly tailor the number or type of students you are drug testing. i.e. athletes and cheerleaders.
- Have both students and parents sign permission forms.
- Regulate substances that will easily pass muster like illegal drugs and alcohol.
- Ensure that there is a legitimate written procedure for who is selected, how they are tested, and how the results for positive drug tests will be handled.
- Try to work with established services that have already done this sort of thing as to create an air of objectivity and a scientific basis for the project.

VI. CONCLUSION

In spite of the dangers and harms faced by students who use drugs, it is possible for school districts to utilize means that rely upon a suspicion based level rather than merely resorting to random suspicionless drug testing. Certainly, situations may exist where it appears

that the most drastic means possible are necessary to combat this problem. It should be remembered, though, that students are people who also have constitutional rights that the government may not violate.

WOW! DID YOU HEAR WHAT THEY SAID?

TRENDS IN THE USE OF IMMORALITY AS A CAUSE OF DISMISSAL FOR SCHOOL PERSONNEL

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Park City, Utah, 3/16/2001

"IMMORALITY"

I. Sources: Sixth through Tenth Decennial Digests and General Digests; Schools & School Districts 141(4); Schools & School Districts 147.20

II. A. Subversive Activities: Communism; loyalty oaths; refusal to answer questions
Steinmetz v. California State Bd. Of Ed., 285 P.2d 617 (Cal. 1955), *cert. denied* 76 S.Ct. 708 (upholding Dilworth Act); Board of Ed. of City of Los Angeles v. Wilkinson, 270 P.2d 82 (Cal.App. 1954); Board of Ed. of City of Los Angeles v. Eisenberg, 277 P2d 943 (Cal.App. 1954); Board of Ed. of City of Los Angeles v. Cooper, 289 P.2d 80 (Cal.App. 1955); Intille v. Hoyer, 88 D. & C. 512; Faxon v. School Committee of Boston, 120 N.E.2d 772 (Mass. 1954); Opinion of the Justices, 127 N.E.2d 663 (Mass. 1955); Appeal of Albert, 99 P.L.J. 445, *affirmed* 92 A.2d 663 (Penn. 1952); Kaplan v. School Dist of Philadelphia, 113 A.2d 164 (Penn. 1955), *affirmed* 130 A.2d 676 (refusal to answer; must be paid for time suspended until dismissal—"he did not earn it because his conduct made him unfit to earn it"); Orange Coast Jr. College Dist. Of Orange County v. St. John, 303 P.2d 1056 (Cal.App. 1957) (refusal to take oath); Laguna Beach Unified Schooll Dist. Of Orange County v. Lewis, 304 P.2d 59 (Cal.App. 1956) (distributing pamplet, refusing to answer, dishonesty); Huntington Beach Union High School Dist. v. Collins, 21 Cal.Rptr. 56 (Cal.App. 1956) (refusal to answer); Governing Bd. of Fullerton Jr. College Dist. of Orange County v. Phillips, 41 Cal.Rptr. 608 (Cal.App. 1965) (membership isn't by unilateral thought: admitted member of communist party 1938-1951, sought readmission in 1957 but was turned down; terminated for refusing to answer questions about who had turned him down); Laba v. Board of Ed. of Newark, 129 A.2d 273 (N.J.1957); Board of Ed. of City of New York v. Allen, 160 N.E.2d 60; Nash v. Board of Ed. of City of New York, 198 N.Y.S.2d 180; Kaplan v. School Dist. of Philadelphia, 130 A.2d 627 (Penn. 1957); Board of Public Ed., School Dist. of Philadelphia v. Watson, 163 A.2d 60 (Penn. 1960); Board of Public Ed., School Dist. of Philadelphia v. August, 177 A.2d 809 (Penn. 1962) (lack of frankness, candor and intellectual honesty, refusal to cooperate, misconduct); Application of Hughes, 138 N.Y.S.2d 686, *reversed* 141 N.Y.S.2d 392, 286 App.Div.180, *affirmed* Hughes v. Board of Higher Ed. of City of New York, 130 N.E.2d 638, 309 N.Y. 319; Thompson v. Wallin, 95 N.E.2d 806 (N.Y.App. 1950), *appeal dismissed* 72 S.Ct. 92, 342 U.S. 801, 96 L.Ed. 607, *affirmed* Adler v. Board of Ed. of City of New York, 72 S.Ct. 380, 342 U.S. 485, 96 L.Ed. 517; Daniman v. Board of Ed. of City of New York, 118 N.Y.S.2d 487; L'Hommedieu v. Board of Regents of University of New York, 95 N.Y.S.2d 443, 276 App. Div. 494, *affirmed* 95 N.E.2d 806, 301 N.Y. 476, *appeal dismissed* Thompson v. Wallin, 72 S.Ct. 92, 342 U.S. 801, 96 L.Ed. 607, *affirmed* Adler v. Board of Ed. of City of New York, 72 S.Ct. 380 ( ), 342 U.S. 485 ( ), 96 L.Ed. 517; L'Hommedieu v. Board of Regents of University of New York, 95 N.Y.S.2d 443, 276 App. Div. 494, *affirmed* 95 N.E.2d 806, 301 N.Y. 476, *appeal dismissed* Thompson v. Wallin, 72 S.Ct. 92, 342 U.S. 801, 96 L.Ed. 607, *affirmed* Adler v. Board of Ed. of City of New York, 72 S.Ct. 380, 342 U.S. 485, 96 L.Ed. 517 (1952).

II. B. Supreme Court lineage on loyalty oaths:
Adler v. Board of Ed. of City of New York, 72 S.Ct. 380, 342 U.S. 485, 96 L.Ed. 517 (1952) (upholding NY Feinberg Law); Wieman v. Updegraff, 73 S.Ct. 215, 344 U.S. 183, 97 L.Ed. 216 (1952) (striking Okla negative oath); Beilan v. Board of Public Ed. School Dist. Of Philadelphia, 78 S.Ct. 1317 (1958); Lerner v. Casey, 78 S.Ct. 1324 (1958) (refusal to answer = incompetency); Shelton v. Tucker, 81 S.Ct. 247, 364 U.S. 479, 5 L.Ed.2d 231 (1960) (invalidating as vague and overbroad Ark statute requiring teachers to list all organizations belonged to in last 5 years); Cramp v. Board of Public Instruction, 82 S.Ct. 275, 368 U.S. 278, 7 L.Ed.2d 285 (1961) (invalidating Fla statute); Baggett v. Bullitt, 84 S.Ct. 1316, 377 U.S.360, 12 L.Ed.2d 377 (1964) (Wash loyalty oaths); Elfbrandt v. Russell, 86 S.Ct. 1238, 384 U.S. 11, 16 L.ed.2d 321 (1966) (invalidating Ariz oath prohibiting knowing, but guiltless behavior); Keyishian v. Board of Regents, 87 S.Ct. 675, 385 U.S. 589, 17 L.Ed.2d 629 (1967) (individual may not be punished or deprived of public employment for political association unless: 1) active member of subversive organization; 2) member with knowledge of illegal aims; 3) has a specific intent to further those illegal ends, as opposed to general support of objectives of organization).

II. C. Civil Rights Activity

Shelton v. McKinley, 174 F.Supp. 351 (E.D.Ark. 1959) (Ark statute on NAACP membership); Rackley v. School Dist. No. 5, Orangeburg County, S.C., 258 F.Supp. 676 (D.S.C. 1966). (civil rights activities, found for plaintiff)

III. Marriage and Pregnancy

State ex rel. Wood v. Board of Ed. of City of St. Louis, 206 S.W.2d 566 (Mo. 1947) (10 females terminated under 1897 rule that equated marriage with resignation); Cardinal v. Dimit, 69 N.E.2d 65 (Ohio App. 1945) (married Aug 7, signed contract with maiden name; informed supt of marriage Dec 27; put on substitute pay until May 14; bd notice to terminate in May); Schluter v. School Dist. No. 42 of Madison County, 96 N.W.2d 203 (Nebr. 1959) (pregnancy; for teacher); Heath v. Westerville Bd. of Ed., 345 F.Supp. 501 (S.D.Ohio. 1972). (pregnancy, found for plaintiff); Reinhardt v. Board of Ed. of Alton Community Unit. School Dist. No. 11, Madison and Jersey Counties., 311 N.E.2d 710 (Ill.App. 1974). (after 12 years service, was 8.5 months pregnant, but married one month; court linked to irremediable conduct; no injury to students, thus no nexus) ("For board to find causes irrmediable, they must have found damage to students, faculty, or school itself." Wells v. Dept of Educ., 230 N.E.2d 6, 8.); Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973), *reversed*, Cleveland BOE v. LaFleur, 94 S.Ct. 791, 414 U.S. 632, 39 L.Ed.2d 52 (1974) (arbitrary cut-off dates for maternity leave have no valid relationship with state interest); Paxman v. Wilkerson., 390 F.Supp. 442 (E.D.Va. 1975) (pregnant, class action suit); New Mexico State Bd. of Ed. v. Stoudt., 571 P.2d 1186 (N.M. 1977) (unwed and pregnant)

IV. Claims of Immorality Amidst Desegregation Actions

Moore v. Board of Ed. of Chidester School Dist. No. 59, Chidester, Ark., 448 F.2d 709 (8th Cir. 1971). (pregnancy, in desegregation reduction in force; wasn't immoral in majority-black school); Buckley v. Coyle Public School System., 476 F.2d 92 (10th Cir. 1973) (dismissed by policy at 6 months pregnancy; summary judgment reversed on allegation of sex and race discrimination); Smith v. Concordia Parish School Bd., 393 F.Supp 1101 (D.C.La. 1975). (conduct repulsive to min. standards of decency, such as honesty and integrity); Gay v. Wheeler., 363 F.Supp. 764. (S.D.Tex. 1973) (unfit to teach; example of requirement to use non-arbitrary, non-capricious, non-discriminatory criteria to release staff; Singleton); Thompson v. Madison County Board of Educ., 476 F.2d 678 (5th Cir. 1973) (Re the Singleton standard: Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1969): "No pre-established objective criteria are necessary to justify the dismissal of a teacher whose conduct does not measure up to these minimum standards of behavior. For example, if a teacher came to school drunk, or was found stealing from the school treasury, or sexually assaulted a student, the school board could substantiate on just cause grounds its firing of that teacher, even though the school system was still in the process of desegregation and whether or not the school board had established any Singleton criteria for discharge." 476 F.2d 679.

V. Sex Issues

V. A. Homosexuality

Morrison v. State Board of Education, 82 Cal.Rptr. 175 (Cal. 1969) (homosexual conduct; must bear directly on unfitness to teach and must cause clearly discernible detriment to school and its students)
Morrison factors to determine unfitness to teach: 1) likelihood conduct adversely impacted students or fellow teachers; 2) proximity or remoteness in time of conduct; 3) type of teaching certificate; 4) extenuating or aggravating circumstances; 5) praiseworthiness or blameworthiness of motives resulting in conduct; 6) likelihood of recurrence of conduct; 7) extent to which disciplinary action would have chilling effect on constitutional rights of teacher.
Governing Bd. of Mountain View School Dist. of Los Angeles County v. Metcalf., 111Cal.Rptr 724 (Cal.App. 1974). (prostitution, oral copulation in doorless toilet stall in public restroom in downtown department store by 6th grade teacher was serious defect of moral character, normal prudence and good common sense); Acanfora v. Board of Ed. of Montgomery County., 491 F.2d 498 (4th Cir. 1974), *cert. denied* 95 S.Ct. 64 (gay activist at Penn State, applied for teaching job without mentioning membership in Homophiles Club; though teacher's public statements regarding homosexuality are protected speech, there were material omissions in teaching application); Burton v. Cascade School Dist. Union High School No. 5., 353 F.Supp. 254 (D.Ore. 1973), *affirmed* 512 F.2d 850 (9th Cir. 1975) (statute for immorality without

defining immorality is unconstitutionally vague because it fails to give fair warning; Lesbian, granted damages, attorney fees for wrongful dismissal but refused to reinstate and overturn non-renewal; stated that unusual equitable injury only on finding of race discrimination or retaliation for a protected right); Board of Ed. of El Monte School Dist. of Los Angeles County v. Calderon., 110 Cal.Rptr. 916 (Cal.App. 1973) (oral copulation; acquitted; found for board); Board of Ed. of Long Beach Unified School Dist. of Los Angeles County v. Jack M., 566 P.2d 602 (Cal. 1977) (commission of sex offenses doesn't demonstrate unfitness to teach per se.; teacher arrested for homosexual solicitation, an offense for which he wasn't charged but which court in civil proceeding found he committed wasn't per se unfit to teach); Gish v. Board of Ed. of Borough of Paramus, Bergen County., 366 A.2d 1337 (N.J.Super.A.D. 1976) *cert. denied* 98 S.Ct. 233 (teacher participating in gay activism ordered to under psychological testing on grounds that his actions displayed evidence of deviation from normal mental health, which may affect his ability to teach, discipline, and associate with students; testing constitutionality of state statute permitting the ordering of psychological tests); Gaylord v. Tacoma School Dist. No. 10., 559 P.2d 1340 (Wash. 1977) cert. denied, 98 S.Ct. 234 (1977) (homosexuality is immoral); National Gay Task Force v. Board of Educ. of City of Oklahoma City, 729 F2d. 1270 (10th Cir. 1984), *probable jurisdiction noted* Board of Education of Oklahoma City, Oklahoma v. National Gay Task Force, 105 S.Ct. 76, 469 U.S. 813, 83 L.Ed.2d 24, 20 Ed. Law Rep. 366, *affirmed* 105 S.Ct. 1858, 470 U.S. 903, 84 L.Ed.2d 776, 23 Ed. Law Rep. 845. (State could provide for dismissal for engaging in "crime against nature" that was indiscreet and not private, oral/anal intercourse); Ross v. Springfield School Dist. No. 19, 716 P.2d 724 (Ore.App. 1986) (engaging in homosexual intercourse publicly in booth in rear of adult bookstore).

V. B. Heterosexuality – Between Adults

Fisher v. Snyder., 346 F.Supp. 396 (D.Neb. 1972), *affirmed* 476 F.2d 375 (8th Cir. 1973) (men, not related to the teacher, stayed in her apartment on several occasions ranging from one night to a period of one week; state failed to show any actual interference by conduct of teacher with state's educational endeavors); Sullivan v. Meade Countiy Independent School Dist. No 101., 387 F.Supp. 1237 (D.S.D. 1975) (living with boyfriend without benefit of matrimony in mobile home owned by school district; one of two teachers in school, with 9 students from 7 families; nexus, notoriety); Sedule v. Capital School Dist., 425 F.Supp 552 (D.Del. 1976), *affirmed* 565 F.2d 153, *cert. denied* 98 S.Ct. 780. (amorous relationship with a married woman lacked a rational nexus with unfitness to teach); Sherburne v. School Bd. of Suwannee County., 455 So.2d 1057 (Fla.App. 1984) (relationship with a member of the opposite sex by schoolteacher didn't meet test of good cause); Clark v. School Bd. of Lake County, Fla., 596 So.2d 735 (Fla.App. 1992). (47 year old female elementary teacher on alcohol-related binge in her home, performed sex act with ex-husband in view of police, pled nolo contendere to abuse of her ex-husband; teacher couldn't be found guilty of misconduct on undetailed charge; termination reversed by court).

V. C. Other Sexual Matters: Fetishes, Transsexualism

Wishart v. McDonald., 500 F.2d 1110 (1st Cir. 1974). (carried on in a lewd and suggestive manner, a dress mannequin that he had dressed, undressed and caressed); Matter of Grossman., 384 A.2d 855 (N.J.Super.A.D. 1978) ("incapacity", sex-reassignment surgery).

V. D. Sexuality Involving Students

V. D. 1. Sexual Actions Moore v. Knowles., 333 F.Supp 53 (S.D.Tex. 1971), *on remand*, 377 F.Supp. 302, *affirmed* 512 F.2d 72. (alleged improprieties which led to his indictment for statutory rape, aggravated assault on minor and like offenses; teacher denied such accusations; hearing not required per Roth and Perry); Goldin v. Board of Ed. of Central School. Dist. No. 1., 359 N.Y.S.2d 384 (N.Y.Sup. 1973) (falsely denied repeatedly to school officials that he had spend the night at the home of a former female student; showed that it may interfere with his responsibilities to his students and his ability to teach); Hankla v. Governing Bd. of Roseland School Dist., Sonoma County., 120 Cal.Rptr. 827 (Cal.App. 1975) (contributing to the delinquency of a minor and indecent exposure—the former charge still pending); Board of Trustees of Compton Jr. College Dist., Los Angeles County v. Stubblefield., 94 Cal.Rptr 318 (Cal.App. 1971) (jr college teacher caught in parked car in state of undress with jr college student; ran over police officer; 80-100 mph chase; nexus; there is no requirement that both the potential for misconduct and the notoriety be present in each case); Board of Trustees of Mount San Antonio Jr. College Dist of Los Angeles County v. Hartman., 55 Cal.Rptr 144 (Cal.App. 1966) (immoral conduct doesn't have to be a sexual offense; cohabitating with community college student under mistaken belief that Mexican divorce and

remarriage was effective); Weissman v. Board of Ed. of Jefferson County School Dist. No. R-1., 547 P.2d 1267 (Colo. 1976) (Arvada H.S. teacher, accused of intimately touching minor female students and speaking vulgar language on field trip to Taos and Santa Fe; court discussed Morrison factors, but said need not show conduct had adverse impact on ability to teach; implicit in dismissal); Denton v. South Kitsap School Dist. No. 402., 516 P.2d 1080 (Wash.App. 1973) (junior high school teacher, having sexual relations with minor female student); Kilpatrick v. Wright., 437 F.Supp. 397 (M.D.Ala. 1977) (making sexual advances to pupils); Ricci v. Davis., 627 P.2d 1111 (Colo. 1981). (hugging, touching or kissing five female students furnished adequate factual warrant for ultimate finding of "immorality indicating unfitness to teach"); Fisher v. Independent School Dist. No. 662, North St. Paul/Maplewood, 357 N.W.2d 152 (Minn.App. 1984) (Elementary school principal's sexual molestation of male student over a period of four years was sufficient grounds for his dismissal); Lile v. Hancock Place School Dist.,701 S.W.2d 500 (Mo.App. E.D. 1985. (fourth grade teacher met divorced mother of one of his students, began living together; all four—teacher, mother and two daughters took baths together, slept together; took photos of girls in nude; board not required to show actual harm to interests of school community due to teacher's alleged "immoral conduct" to permit termination it was sufficient to establish that substantial harm was likely to occur if individual remained as a teacher); Potter v. Kalama Public School Dist., No. 402, 644 P.2d 1229 (Wash.App. 1982) (improper behavior toward female students); Pryse v. Yakima School Dist No. 7, 632 P.2d 60 (Wash.App. 1981) (teacher's making sexually exploitive statements to female students); Tuffli v. Governing Bd. of San Diego Unified School Dist., 36 Cal.Rptr.2d 433 (Cal.App. 1994) (termination of teacher due to oral copulation of an 18 year old female student with Down's Syndrome; subsequently overturned; due a hearing again on termination; Note: Morrison, sex crime is automatic); Sublett v. Sumter County School Bd., 664 So.2d 1178 (Fla.App. 1995). (to terminate teacher on charge of sex abuse, sch. bd. must prove by a preponderance of evidence the charge of sex abuse against daughter; insufficient to terminate on basis of allegations made); Miller v. Grand Haven Bd. of Educ., 390 N.W.2d 255 (Mich.App. 1986) (five incidents involving four 5th and 6th grade girls of exposing himself); Johnson v. Board of Trustees, Beaverhead County High School Dist., 771 P.2d 137 (Mont. 1989) (sexual activity with two students); Weaver v. Board of Educ. Of Pine Plains Central School Dist., 514 N.Y.S.2d 473 (N.Y.App.Div. 1987) (disobeying directive of superintendent to cease and desist from residing with 16 year old male former student who was found to have left home over his mother's objections and with aid of the teacher); West Va. Dept. of Human Services v. Boley, 358 S.E.2d 438(W.Va. 1987) (Must terminate under teacher tenure statute, not child abuse and neglect statute); Montefusco v. Nassau County, 39 F.Supp.2d 231 (E.D.N.Y.1999) (in investigating whether teacher and girls' softball coach had surreptitiously taken photos of teenage girls and used them to masturbate, board did not violate teacher's substantive due process rights); Toney v. Fairbanks North Star Borough School Dist.,, Bd. of Educ., 881 P.2d 1112 (Alaska 1994) (engaging in sexual relationship with 15 year old girl while working in Idaho school many years before); Parker v. Board of Educ. of Byron Center Public Schools, 582 N.W.2d 859 (Mich.App. 1998) (16 yr interval did not unduly prejudice case preparation for teacher who allegedly had sex with student prior to and after her high school graduation); Ross v. Robb, 662 S.W.2d 257 (Mo.App. E.D. 1996) (voc teacher with only one female in class of boys did nothing to stop sex harassment of female, hugged in suggestive way, centerfold calendar, phallus; statute on immoral conduct not unconstitutionally vague); Wright v. Mead School Dist. No. 354, 944 P.2d 1 (Wash.App.1997) (sexual contact sufficient cause for discharge); Hamm v. Poplar Bluff R-1 School Dist, 955 S.W.2d 27 (Mo.App. S.D. 1997) (14 year old girl in teacher's house after midnight, answered door in his boxers); Smith v. King City School Dist. R-1 of Gentry County, 990 S.W.2d 643 (Mo.App. W.D. 1998) (allegations from community members that teacher had sexually molested two boys several years before employment with school district; no duty of school to investigate truth or falsity of report; immoral conduct rendering teacher unfit to perform teaching duties was not unconstitutionally vague); Board of Educ. of City School Dist. of City of New York v. Mills, 680 N.Y.S.2d 683 (N.Y. App. Div. 1998) (three years' suspension without pay for forming romantic relationship with student was not grossly disproportionate to the offense as to shock one's conscience and sense of fairness); Baltrip v. Norris, 23 S.W.3d 336 (Tenn.App. 2000) (voc teacher who hugged and allegedly kissed female student in house he was building); Andrews v. Independent School Dist. No. 57, 12 P.3d 491(Okla.Civ.App. 2000) (romantic relationship with student; sexually exploitive or provocative conduct).

V. D. 2. Sexual Words

Penn-Delco School Dist v. Urso., 382 A.2d 162 (Penn. 1978) (separate incidents involving proposed spanking of two of his female high school students, which each perceived as sexual in nature, teacher couldn't be found guilty of immorality solely upon his admitted sexual fantasies about spanking girls; engaged in sexual discussions with two of his female students; his conduct offended moral standards of community); Madril v. School Dist. No. 11, El Paso County, 710 P.2d 1(Colo.App. 1985) (insufficient to support school boards finding of sexually provocative or exploitive conduct; thus didn't justify dismissal of teacher; "I know you're here for me, and I know you are here to see me," wasn't substantial evidence); Downie v. Independent School Dist. No. 141, 367 N.W.2d 913 (Minn.App. 1985) (breaching student confidences, clearly violating code of professional ethics; making weight loss bet with ninth grade students, terms of which included sexual activities; sexually harassing staff and students; supported immediate discharge for alleged immoral conduct and conduct unbecoming a teacher); Governing Bd. Of ABC Unified School Dist. v. Haar, 33 Val.Rptr.2d 744 (Cal.App. 1994) (allegedly touched students inappropriately, made comments, made students uncomfortable; held for school district); Board of Educ. of Sparta Community Unit School Dist. No 140 v Illinois State Bd. of Educ., 577 N.E.2d 900, (Ill.App. 1991) (immoral conduct, sexual letters to students); Sauter v. Mount Vernon School Dist. No. 320, Skagit County, 791 P.2d 549 (Wash.App. 1990) (dialogue and letter writing with female high school student was sexually exploitative, sufficient cause to discharge)

VI. Use of Alcohol or Drugs

VI. A. Alcohol

Tracy v. School Dist. No. 22, Sheridan County, Wyo., 243 P.2d 932 (Wyo. 1952), *rehearing denied* 247 P.2d 153 (drinking on school property; offering drink to students; moral conduct shall be in all respects exemplary); Blaine v. Moffat County School Dist. Re No. 1, 748 P.2d 1280 (Colo. 1988) (neglect of duty for drinking beer with cheerleaders in a motel room); Coupeville School Dist No. 204 v. Vivian, 577 P.2d 192 (Wash.App. 1984) (allowing two students to drink at his home; considering impact on his teaching ability; district conclusively established misconduct and effect); Norton v. Board of Educ. of Jefferson County Schools, 748 P.2d 1337 (Colo.App.1987). (provided alcohol to underage students; recommendation of dismissal appropriate);

VI. B. Drugs

Governing Bd. of Nicasio School Dist. of Marin County v. Brennan., 95 Cal.Rptr 712 (Cal.App. 1971) (can't dismiss employee whose personal, private conduct incurred its disapproval; teacher's affidavit telling of her long and beneficial use of marijuana not sufficient for termination); Board of Trustees of Santa Maria Joint Union High School Dist. v. Judge., 123 Cal.Rptr. 830 (Cal.App. 1975). (cultivation of solitary marijuana plant; teacher cannot be dismissed for conviction of felony unless felony involves moral turpitude; conviction of a felony does not constitute grounds for dismissal; nexis); Comings v. State bd. of Ed., 100 Cal.Rptr 73 (Cal.App. 1972) (convicted of marijuana possession; cannot abstractly characterize as statutory cause; conduct must indicate unfitness to teach); Von Durjais v. Board of Trustees Rosland School Dist., 148 Cal.Rptr. 192 (Cal.App. 1978), 83 C.A.3d 681. (Possessing marijuana without more doesn't constitute "immoral conduct"); Shearer v. Com., Secretary of Ed., 424 A.2d 633 (Penn. 1981) (possession of marijuana and contributing to delinquency of minor, charges not supported by evidence); Chicago Bd. of Ed. v. Payne., 430 N.E.2d 310 (Ill.App. 1981) (must be nexus between actions alleged as cause and individual's fitness to perform as teacher; possession of marijuana); Baker v. School Bd. of Marion County., 450 So.2d 1194 (Fla.App. 1984) *petition denied* 456 So.2d 1182. (arrest for possession of illegal alcohol and marijuana didn't justify teacher's dismissal in absence of substantial competent evidence to support findings that teacher was guilty of immorality or misconduct in office); Dupree v. School Committee of Boston, 446 N.E.2d 1099 (Mass.App. 1983), *review denied* 451 NE.2d 1166. (possession with intent to distribute cocaine); Board of Educ. of Hopkins County v. Wood, 717 S.W.2d 837 (Ky 1986). (smoked marijuana off-campus with two 15 year old students); Rogliano v. Fayette County Bd. of Educ., 347 S.E.2d 220(W.Va. 1986) (arrest for small amount of marijuana and charges dismissed; misdemeanor did not warrant dismissal, misconduct occurred in private, school board contributed to notoriety of teacher); Barcheski v. Board of Educ. of Grand Rapids Public Schools, 412 N.W.2d 296 (Mich.App. 1987) (invited two female students to party; drank and smoked marijuana with 15 year old female student; took intoxicated student home alone; evidence inconclusive on whether he had had sex with student); Ambus v. Granite Bd. Of Educ., 975 F.2d 1555, *rehearing granted, modified on rehearing* 995 F.2d 992 (10th Cir.

1992) (tenured teacher, suspended for drug sales, blocked from s. 1983 claim due to 11th Amendment); West Valley-Mission Community College Dist. v. Conception (Miller), 21 Cal. Rptr.2d 5 (Cal.App. 1993) (sale of cocaine to community college student; fact that teacher committed immoral act isn't appropriate basis for discharge unless it indicates unfitness to teach); Jefferson County School Dist. No. 509-J v. Fair Dismissal Appeals Bd., 812 P.2d 1384 (Ore. 1994) (teacher's acquiescence to her husband's use and sale of marijuana from their home for over two years); Dubuclet v. Home Ins. Co., 660 So.2d 67, rehearing denied, 664 So.2d 446 (La.App. 1995) (possession of marijuana and cocaine; criminal record expunged); Gedney v. Board of Educ of Town of Groton, 703 A.2d 804 (Conn.App. 1997) (possession of narcotics, properly terminated for "moral misconduct"); Woo. v. Putnam County Bd. of Educ., 504 S.E.2d 644 (W.Va. 1998). (marijuana possession; notoriety warranted dismissal; for school board employee dismissal for acts performed at a time and place separate from employment, there must be a rational nexus between outside acts and duties)

VII. Criminal Convictions and Acquittals

VII. A. In General

Jenkyns v. Board of Ed of District of Columbia, 294 F2d 260 (D.C.Cir. 1961) (criminal proceeding with directed verdict of not guilty supported termination of jr high principal); Alford v. Ingram, 931 F.Supp. 768 (M.D.Ala. 1996) (tests 1994 statutory change requiring criminal background check; bringing stolen vehicle into state, cocaine possession, theft of property; not unconstitutionally vague though limited to Morrison standard; statute allowed dismissal for immoral conduct and unbecoming or indecent behavior only if conduct indicates that teacher is unfit to teach).

VII. B. Drunk and Disorderly

Bradford v. School Dist. No. 20, Charleston, S.C., 244 F.Supp. 768 (E.D.S.C. 1965) (conviction for drunk and disorderly conduct); Williams v. School Dist. No. 40 of Gila County., 417 P.2d 376 (Ariz.App. 1966) (guilty to charges of disturbing the peace by being intoxicated, attempting to fight and by display of gun); Matter of Tanelli., 477 A.2d 394 (N.J.Super.A.D. 1984), *cert. denied* 491 A.2d 646. (conviction for being a disorderly person was the only evidence on the point).

VII. C. Leaving Scene of Accident

Hale v. Board of Ed. City of Lancaster., 234 N.E.2 583 (Ohio 1968) (left scene of collision without stopping; not cause for termination).

VII. D. Bribery

Pordum v. Board of Regents of State of N.Y., 491 F.2d 1281 (2nd Cir. 1974), *cert. denied* 95 S.Ct. 74 (on challenge to education commissioner on removing certification; convicted for conspiracy to promote bribery of public official while serving in county legislature)

VII. E. Bomb Threat

Board of Ed. of Sunnyvale Elementary School Dist. v. Commission on Professional Competence of Sunnyvale Elementar School Dist., 162 Cal.Rptr. 590 (Cal.App. 1980), 102 C.A.3 555. (making a false bomb threat didn't constitute, per se, unfitness to teach; conflicting testimony favored teacher);

VII. F. Involuntary Manslaughter

Burrow v. Randolph County Bd. of Educ., 301 S.E.2d 704 (N.C.App. 1983) (teacher pled nolo contendere to crime of involuntary manslaughter in connection with death of her husband);

VII. G. DUI

Lindgren v. Board of Trustees, High School Dist. No. 1., 558 P.2d 468 (Mo.App 1976) (driving under the influence and without valid driver's license is not "immorality" in absence of establishing a causal relationship with teaching act); Hoagland c. Mount Vernon School Dist. No. 320, Skagit County, 623 P.2d 1156 (Wash. 1981) (without an actual showing of impairment to teaching, simply labeling an instructor as a convicted felon won't justify a discharge); Turk v. Franklin Special School Dist., 640 S.W.2d 98 (Tenn. 1982). (DUI was insufficient to support dismissal of teacher of plaintiff's caliber); Rado v. Board of Educ. of Borough of Nugatuck, 583 A.2d 102 (Conn. 1990) (tampered telephone to eavesdrop, class D felony, moral misconduct).

VII. H. Arson
Newchurch v. Louisiana State Bd. of Elementary and Secondary Educ., 713 So.2d 1269 (La.App. 1998) (certification may be revoked or denied for felony conviction, including arson).

VII. J. Trafficking in Counterfeit Goods
Kinniry v. Abington School Dist., 673 A.2d 429 (Pa.Cmwlth. 1996) (trafficking in counterfeit goods or services was per se offensive to community and warranted termination for immorality; offense was crimen falsi due to element of deceit involved).

VII. K. Gambling
Ford v. Bay County School Bd., 253 So.2d 728 (Fla.App. 1971) (operated liquor store, possession of illegal gambling paraphernalia, engaged in illegal gambling operations).

VII. L. Firearms, Assault
Wright v. Superintending School Committee, City of Portland., 331 A.2d 640 (Me. 1975) (bringing gun by teacher who was licensed gun dealer to school in jacket didn't constitute unfitness to teach; doesn't involve moral impropriety); Landry v. Ascension Parish School Bd., 415 So.2d 473 (La.App. 1982), *writ denied* 420 So.2d 448. (teacher displayed gun to student to defend himself); Horton v. Jefferson County-Dubois Area Vocational Technical School, 630 A.2d 481 (Penn. 1993) (director of voc ed center grabbed head counselor and threatened to shoot him, convicted of harassment; reinstated); In re Thomas, 926 S.W.2d 163 (Mo.App. 1996) (immoral conduct, not limited to listed situations, intentional shooting is ground for dismissal); Clarke v. School Bd. of Lake County, Fla., 596 So.2d 735 (Fla.App. 1992) (plea of *nolo contendere* to abusing her disabled husband could not be used to be found guilty of misconduct in office).

VII. M. Tax Problems
McCullough v. Illinois State Bd. of Educ. by Feuille, 562 N.E.2d 1233 (Ill.App. 1990) (failure to file tax returns).

VII. N. Theft
Petrino v. Board of Ed of City of Shelton., 426 A.2d 795 (Conn. 1980), 179 Conn. 428. (conviction of larceny in second degree, class D felony; hearing panel voted to reinstate but board terminated anyway; not an abuse of discretion); Lesley v. Oxford Area School Dist., 420 A.2d 764 (Penn. 1980) (shoplifting; offended morals of community and was bad example to youth whose ideals teacher was to foster and elevate); Kenai Peninsula Borough Bd. of Educ. v. Brown, 691 P.2d 1034 (Alaska 1984) (Board couldn't dismiss tenured teacher convicted of diverting electricity based on principle that thefts are crimes of moral turpitude since teacher's conviction of diverting electricity didn't necessarily include all elements of theft); McBroom v. Board of Educ., Dist. No 205., 494 N.E.2d 1191 (Ill.App. 1986) (theft of check from student's locker was irremediable); Perryman v. School Committee of Boston., 458 N.E.2d 748 (Mass.App. 1983) (there must be direct relationship between activity resulting in indictment and trust before conduct in question; teachers' alleged conduct resulting in indictments on welfare fraud charges); Kimble v. Worth County R-III Bd. of Educ., 669 S.W.2d 949 (Mo.App. 1984), *cert.denied* 105 S.Ct. 331. (taking of property belonging to another without consent); Golden v. Board of Educ of Harrison County, 385 S.E.2d 665(W.Va. 1981) (nexus; female guidance counselor arrested for felony shoplifting, pled nolo contendere for misdemeanor theft; overturned for failure to show unfitness); Cochran v. Board of Educ. of Mexico School Dist. No. 59, 815 S.W.2d 55 (Mo. App. 1991) (theft of school property; nexus); Stelzer v. State Bd. of Edn., 595 N.E.2d 489 (Ohio App. 1991) (misconduct supported by conviction for illegal receipt of welfare benefits); Lesley v. Oxford Area School Dist., 420 A.2d 764 (Penn. 1980) (shoplifting); Matter of Shelton, 408 N.W.2d 594(Minn.App. 1987) (theft by swindle); Satterfield v. Board of Educ. of the Grand Rapids Public Schools, 556 N.W.2d 888 (Mich.App. 1996) (rational nexus existed, embezzling, discharge was proper);

VIII. Internal Problems within Schools
VIII. A. Residency
Miller v. South Bend Special School Dist. No.1, McHenry County, 124 N.W.2d 475 (N.D. 1963) ("misconduct" of removing residence from community; found for teacher)

VIII. B. Misuse or Misappropriation of School Funds

Board of Ed. of Choctaw County v. Kennedy, 55 So.2d 511 (Ala. 1951)(principal discharged for writing check from agency funds to loan $150 to janitor; unintentional and honest mistake); Appeal of Flannery, 178 A.2d 751 (Penn. 1962) (teacher with obsessive-compulsive disorder misappropriated funds; argued should have been charged with mental derangement instead of misconduct); Brownsville Area School Dist. v. Alberts, 260 A.2d 765 (Pa. 1970) (receiving salary for position and also federal funds for supervising Head Start Program did not establish immorality); Carmichaels Area School Dist. v. Harr, 429 A.2d 126 (Penn. 1981) (affirms order overturning dismissal for misappropriation of school funds for stereo purchased with agency funds and stored at home);

VIII. C. Attendance Problems

Board of Ed. of Richmond School Dist. v. Mathews, 308 P.2d 449 (Cal.App. 1957) (failure to report for duty, unprofessional conduct; secured substitute for one day in October, gone two weeks; did not report at all the next September); State ex rel. Allen Board of Public Instruction of Broward County., 214 So.2d 7(Fla. 1968), cert. discharged, 219 So.2d 430 (Fla. 1969) (absences; biased board members must recuse selves); Cadell v. Ecorse Bd. of Ed., 170 N.W.2d 277 (Mich.App. 1969). (falsification of sign-in time); Lucciola v. Com. Secretary of Ed., 360 A.2d 310 (Pa.Cmwlth. 1976) (spent entire week on skiing holiday with student rather than on personal business and sick leave as was indicated to school authorities; warranted discharge for persistent and willful violation of school laws); Aubuchon v. Gascondade County R-1 School Dist., 541 S.W.2d 322 (Mo.App. 1976) (teacher who contended that she was too ill to teach for five-day period and who traveled to Las Vegas and attended convention meetings with her husband during such period); Holt v. Board of Ed. of Webutuck central School Dist., 439 N.Y.S.2d 839 (N.Y.1981) (absent from duty station, within 3 years of occurrence); Bethel Park School Dist. v. Krall., 445 A.2d 1377 (Penn. 1982), *cert. denied* 104 S.Ct. 162. (misrepresentations as to reason for absences were properly subject of immorality); Board of Educ. of Laurel County v. McCollum, 721 S.W.2d 703 (Ky. 1986) (called in sick to drive coal truck to another state);

VIII. D. Documents and Records

Board of Ed. of San Francisco Unified School Dist. v. Weiland, 4 Cal.Rptr 286 (Cal.App. 1960) (falsified attendance records, immoral, even though it has no relationship to sexual offense); Negrich v. Dade County Bd. of Public Instruction, 143 So.2d 498 (Fla.App. 1962) (made false statement about nationality on application; argued that he wasn't charged with wording of statute); Logan v. Warren County Bd. of Educ., 549 F.Supp. 145 (S.D.Ga. 1982) (submitting false documents to IRS); Cochran v. Board of Educ. of Mexico School Dist. No. 59, 815 S.W.2d 55 (Mo.App. 1991) (filing false reports in connection with sales of surplus property; immoral conduct isn't limited to sexual conduct); Morris v. Illinois State Bd. of Educ., 555 N.E.2d 725 (Ill.App. 1990) (coursework deficiency not immoral conduct or violation of public trust);

VIII. E. Dishonesty

Bickford v. Board of Educ. of School Dist. No 82 of Hill County., 336 N.W.2d 73 (Neb. 1983) (untruthful statements made by guidance counselor to school principal, who was counselor's superior, constituted "unprofessional conduct"); Florian v. Highland Local School Dist. Bd. of Educ., 493 N.E.2d 249 (Ohio App. 1983) (wrestling coach, who instructed freshman wrestler to misrepresent his status by weighing in for older wrestler so that latter, overweight boy could participate in tournament); Balog v. McKeesport Area School Dist, 484 A2d 198 (Penn. 1984) (lying); Riverview School Dist. v. Riverview Educ. Ass'n, PSEA-NEA, 639 A.2d 974 (Penn. 1994) (Immorality may include lying or making false statements to school district staff); Riverview School Dist. v. Riverview Educ. Ass'n, PSEA-NEA, 639 A.2d 974 (Pa. Cmwlth. 1994) (lying or making false statements to school district staff is immorality under school code);

IX. Non-Exemplary Teaching Matters

IX. A. Name-Calling

MacKenzie v. School Committee of Ipswich, 174 N.E.2d 657 (Mass. 1961) (calling supt "SOB" after 23 years of service); Jerry v. Board of Ed. of City School Dist of Syracuse., 376 N.Y.S.2d 737 (N.Y.A.D. 1975), 50 A.D.2d 149. (using excessive physical force; profane language with 2nd, 3rd, and 4th graders in p.e. class: "little shitheads," "dummies," "damn babies," "little bastards"; found for school board); Alabama State Tenure Commission v. Mountain Brook Bd. of Ed., 343 So.2d 518 (Ala.Civ.App. 1976), *reversed, remanded* 343 So.2d 522. (mocking, intimidating students; making racial slurs to class); Resetar

v. State Bd. of Ed., 399 A.2d 225 (Md. 1979), *cert.denied* 100 S.Ct. 74 (referring to pupils as "jungle bunnies" constituted misconduct in office); Thompson v. Wake County Bd. of Ed., 230 S.E.2d 164 (N.C.App. 1976), reversed 233 S.E.2d 538 (N.C. 1977) (use of words "damn" and "hell", "frogging" not insubordinate, but calling students "whores" was immoral); Bovino v. Board of School Directors of Indiana Area School Dist., 377 A.2d 1284 (Penn. 1977) (calling fourteen year old female student a "slut" and "prostitute" constituted "immorality"); Clarke v. Board of Educ. of School Dist. of Omaha, Douglas County, Neb., 338 N.W.2d 272 (Neb. 1983) (calling black students in a racially mixed class "dumb niggers" constituted "immorality")

IX. B. Use of Vulgarity

State ex rel. Wasilewski v. Board of School Directors of City of Milwaukee, 111 N.W.2d 198 (Wis. 1961) (discussion of sex matters in speech class: prices of whorehouses, hymen-breaking, favoring premarital sex); Jarvella v. Willoghby-Eastlake City School Dist. Bd. of Educ., 233 N.E.2d 143 (Ohio Com.Pl. 1967) (under statute authorizing termination of teacher's contract for "immorality", quoted phrase is inseparable from "conduct" and relates to conduct which is hostile to welfare of school community; teacher's private conduct is proper concern to those who employ him only to the extent that it mars him as a teacher; writing letters which contained language many adults would find gross, vulgar, and offensive but some eighteen year old males wouldn't; wrote and mailed to former male student); Keefe v. Geanakos., 418 F.2d 359 (1st Cir. 1969) (distributed article from *Atlantic Monthly* using word: "vulgar description of an incestuous son", where word was found in five books in the library, denial of injunctive relief reversed); Palo Verde Unified School Dist. of Riverside County v. Hensey., 88 Cal.Rptr 570 (Cal.App. 1970), 9 C.A.3d 967. (tearing out loudspeaker, multiple references to whorehouses; addressing Mexican-American students on dangers of syphilis strain in San Luis; licking the wall; referring to walls as "looking like someone peed on them" or "baby crap"); Lindros v. Governing Bd. of Torrance Unified School Dist., 103 Cal.Rptr. 188 (Cal.App. 1972) (using vulgarity—reading *The Funeral* which contains words "white motherfucking pig"); Oakland Unified School Dist of Alameda County v. Olicker, 102 Cal.Rptr. 421 (Cal.App. 1972) (reproducing materials containing references to male and female sex organs and the sexual act); Celestine v. Lafayette Parish School Bd., 284 So.2d 650 (La.App. 1973) (requiring two fifth grade girls to write vulgar four letter word some 1,000 times in presence of classmates); Brubaker v. Board of Ed., School Dist 149, Cook County, Illinois., 502 F.2d 973 (7th Cir. 1974), *cert. denied* 95 S.Ct. 1953, *clarified* 527 F.2d 611. (distributing poem not relevant to subject matter, thrust of which was alluring invitation and beckoning to throw off disciplines imposed by moral environment of their homelife and enter a new world of love and freedom, including the freedom to use drugs, to take their clothes off and get an early start in use of certain vulgarities); Frison v. Franklin County Bd. of Ed., 596 F.2d 1192 (4th Cir. 1979) (reading to her classes part of a note which contained vulgar colloquialisms); Central York School Dist. v. Ehrhart., 387 A.2d 1006 (Penn. 1978) (elementary school teacher overheard his 11 and 12 yr old students using slang terms with specific sexual connotations thereafter telling class which consisted of children of both sexes that he disapproved of such words and in requesting class to supply him with definitions of list of such words if they knew them; teacher's conduct not "immorality" where there was no evidence in record that conduct could be interpreted as encouragement to children to use such words); Gerig v. Board of Educ. of Cent. School Dist., R-111, 841 S.W.2d 731 (Mo. App. 1992) (editing class newspaper with tasteless sexual references and articles condoning drug use, even if a "teaching technique"); Fowler v. Board of Educ. of Lincoln County, Ky., 819 F.2d 657 (6th Cir. 1987), *cert. denied* 108 S.Ct. 502. (conduct unbecoming a teacher: showing movie *Pink Floyd, The Wall*); Fiscus v. Board of School Trustees of Cent. School Dist of Greene County, 509 N.E.2d 1137 (Ind.App. 1987) (one-time obscene remark of "fuck you" in fifth grade art class by 12 year veteran with unblemished record)

IX. C. Not Getting Along With Others

Hayslip v. Bondurant, 250 S.W.2d 63 (Tenn. 1952) (issued press release on unfounded charges that students in Memphis high school were engaged in an organized club for sexual immorality); Appeal of Coates, 287 P.2d 102 (Wash. 1955) (called board members "communists" and removed envelope from superintendent's office for fired superintendent; did not constitute unprofessional conduct); Watts v. Seward School Bd., 421 P.2d 586 (Alaska 1966) (union speech, solicited others to oust the supt); Kersey v. Main Consol. School Dist. No. 10, 394 P.2d 201 (Ariz. 1964) (community squabble); Griggs v. Board of Trustees of Merced Union High School Dist., 389 P.2d 722 (Cal.App. 1957) (lack of self-restraint and tact with co-workers, parents, and pupils); Madison County Bd. Of Ed. v. Miles, 173 So.2d 425 (Miss. 1965)

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(variety of vague charges against principal: impugned integrity of other employee; antagonized patrons evidenced by petition signed by eight persons--overturned); Pearson v. Board of Ed., Community Unit School Dist. No. 5, Macoupin County, 138 N.E.2d 326 (Ill.App. 1956) (suffered nervous condition precipitating in numerous displays of temper; board's power to dismiss a teacher is not confined to situations where certain specific causes exist, failure to cooperate is sufficient; not remediable); Beebee v. Haslett Public Schools., 239 N.W.2d 724 (Mich.App 1976) (did not get along with parents or principal; followed Morrison analysis to find for teacher); Petition of Davenport., 283 A.2d 452 (Vt. 1971) (petitioning school board for symposium on nation's involvement in Southeast Asia wasn't conduct unbecoming teacher); Ellenburg v. Hartselle City Bd. of Ed., 349 So.2d 605 (Ala.Civ.App. 1977) (falsehoods and willfully creating dissention); Spriggate v. School Committee of Mattapoisett., 415 N.E.2d 888 (Mass.App. 1981) (pattern of persistant disruptive behavior is conduct unbecoming a teacher); Mockler v. Ambach., 434 N.Y.S.2d 809 (N.Y.App. 1980) (striking school principal in the face and using profane language and threats; conduct found to undermine school operations); Scheiber v. New York City Bd. of Educ., 593 N.Y.S.2d 563, 80 Ed. Law Rep. 953 (N.Y.App.Div. 1993) (solicited student to vandalize assistant principal's automobile); Barringer v. Caldwell County Bd. of Educ., 473 S.E.2d 435 (N.C.App. 1996) (approaching pool hall with fully loaded shotgun and sidearm, indicating violent intent, was likely to become known to students, manifested approval of violence and taking law into one's own hands); Hawzipta v. Independent School Dist. No. I-004 of Noble County, 13 P.3d 98 (Okla.Civ.App. 2000) (teacher's personal belief that principal had purchased pornographic material found in dumpster, even if mistaken, was not moral turpitude)

IX. D. Improper Discipline

Hodgkins v. Board of Ed. of central School Dist. No. 1 of Towns of Conklin, Et Al., Broome County., 376 N.Y.S.2d 235 (N.Y.A.D. 1975), 50 A.D.2d 73. (excessive force; found for teacher); Clayton v. Board of Ed. of Central School Dist. No. 1 of Towns of Conklin Et Al., Broome County., 375 N.Y.S.2d 169 (N.Y.A.D. 1975), 49 A.D.2d 343. (excessive force; engaging in fisticuffs; 3 year SOL); Kendall v. Board of Ed. of Memphis City Schools., 627 F.2d 1 (6th Cir. 1980) (very serious misconduct which threatens the safety of students); Winship v. Brewer School Committee., 390 A2d 1089 (Me. 1978) (single incident of misconduct where teacher shouted at and forcibly removed female student; threw chair at student, and injured student's leg; no nexus, thus reversed); Kroll v. Independent School Dist. No. 593., 304 N.W.2d 338 (Minn. 1981) (evidence did not show that teacher used straight pins to punish student by having him extend his arms with pins at elbows, causing pain if he dropped his arms; found remediable; reinstated with back pay); Board of Educ. of Argo-Summit Schol Dist No. 14, Cook County v. Hunt, 487 N.E.2d 24 (Ill.App. 1985) (elementary physical education teacher's actions of pinching three second-grade female students on buttocks during physical education class was irremediable); Pisculli v. Board of Educ. of City of Mt. Vernon., 492 N.Y.S.2d 807 (N.Y.App.Div. 1985) (physical abuse of emotionally disturbed students); Belasco v. Board of Public Educ. of School Dist. of Pittsburgh., 486 A.2d 538 (Penn. 1985), *affirmed* 510 A.2d 337. (use of excessive force against student; "intemperance"); State v. Ercolano, 762 A.2d 259 (N.J.Super. 2000) (assaulting student by grabbing and throwing against wall)

IX. E. Questionable Student Motivation Techniques

Werner v. Community Unit School Dist. No. 4, Marshall County, 190 N.E.2d 184 (Ill.App. 1963) (letting 2nd grade students grade their own tests, change answers on standardized tests, delay taking tests to make her students look better; reversed because thought remediable); Gatewood v. Little Rock Public Schools., 616 S.W. 2d 784 (Ark.App. 1981) (making offer of higher grades to students in exchange for purchases of raffle tickets); Mott v. Endicott School Dist. No. 308, 713 P.2d 98 (Wash. 1986) (intentionally striking students' genitals is immoral, regardless of whether teacher's conduct is sexually motivated); Youngman v. Doerhoff, 890 S.W.2d 330 (Mo.App. 1994) (male teacher charged with hugging and kissing male middle school student on neck, with no evidence of sexual motive; immoral conduct isn't grounds for discipline unless teacher unfit to teach); Forte v. Mills, 672 N.Y.S.2d 497, 126 Ed.Law Rep. 362 (N.Y.App.Div. 1998) (poking fourth and fifth grade female students in the back and snapping their bra straps was conduct unbecoming a teacher); Everett Area School Dist. v. Ault, 548 A.2d 1341 (Pa. Cmwlth. 1988). (engaging in water fight with students and retaliating in water fight by spraying students with cleaning fluid, in direct violation of orders of supervisors did not constitute "immorality");

Other Points:

Fadler v. Illinois State Bd. of Educ, 506 N.E.2d 640 (Ill.App. 1987) (Immorality is sufficient cause for dismissal of tenured teacher if record reveals harm to pupils, faculty, or school);

Baldridge v. Board of Trustees, Rosbud County School Dist. No. 19, Colstrip, Mont., 951 P.2d 1343 (Mont. 1997), 287 Mont. 53, 124 Ed. Law Rep. 424, rehearing denied. (only one of the statutory bases for dismissal needs to exist)

Johnson v. Board of Trustees, Beaverhead County High School Dist., 771 P.2d 137 (Mont. 1989) (only one of the statutory basis for dismissal needs to exist)

Yanzick v. School Dist. No. 23, Lake County Mont., 641 P.2d 431 (Mont. 1982), 196 Mont. 375, 2 Ed. Law Rep. 1179. (immoral conduct must be such as to directly affect teacher's performance of duties to justify non renewal of tenured teacher

	Incompetency	Insubordination	Neglect of Duty	Immorality	RIF	Other Good & Just Cause	Non Compliance w/Rules	Unprofessional Conduct	Physical or Mental Disability	Conviction of a Felony	Disloyality	Drunkenness	Crime of Moral Turpitude	Inciting Students	Certification ( )	Cruelty	Best Interest	Dishonesty	Unlawful group	Unfit for Service	Brutal Treatment of Student	Excessive/Unreasonable Absence	Failure to Improve	Advocating Overthrow of Gov	Failure to Perform Duties	Failure to Repay $ to State	Negligence in Performance of Duties	Instructional Ineffectiveness	Violation of a Law	Inefficiency	Willful Neglect	Grounds for Revocation of Certificate	Failure to Pay Debts	Habitual Drug Use	Failure to Take Test	Breach of Contract	Revoked Certificated in Another State	Delivery, Manufacture, Production of Drugs	Kidnapping a Child	Unprofitable to the School	Reasons in Employment Contract	Any Offense Involving Child	Intemperance	Any Cause not Arbitrary, Capricious, Discriminatory	Involuntary Manslaughter	Membership in Communist Party	Failure to Secure and Maintain Training	Not Qualified to Teach	Mental or Physical Abuse to a Child	Unsatisfactory Teaching Performance	Probable Cause	Commission, aiding, advocating acts of Criminal syndicalism	Violation of section 51530	Violation of Sections 7001-7007
Alabama	X	X	X	X	X	X	X																																												
Alaska	X			X			X																																												
Arizona	X			X			X	X																																										
Arkansas							X																																											
California	X			X			X	X	X	X		X	X					X		X													X																X	X	X
Colorado	X	X	X	X			X		X	X																																							
Connecticut	X	X		X	X	X			X																				X																				
Delaware	X	X	X	X	X			X			X																																						
Florida	X	X	X	X				X				X	X																																				
Georgia	X	X	X	X	X	X								X																																			
Hawaii				X	X	X	X																						X																				
Idaho	X		X				X						X					X														X										X		X	X				
Illinois	X			X	X	X									X	X							X				X																						
Indiana	X	X	X	X	X	X																																											
Iowa						X																																											
Kansas			X	X		X																												X															
Kentucky	X	X	X	X				X	X																				X																			
Louisiana	X		X															X	X																														
Maine						X														X				X																									
Maryland	X	X	X	X				X																																									
Massachusetts	X	X				X		X	X																				X																			
Michigan						X																																											
Minnesota	X					X	X	X																																									
Mississippi	X		X	X		X														X																													
Missouri	X	X		X			X		X	X			X									X							X																			
Montana	X			X			X													X																													
Nebraska	X	X	X	X				X	X																								X																
Nevada	X	X	X	X	X	X	X	X	X	X		X						X				X	X	X					X	X				X															
New Hampshire	X			X			X													X																													
New Jersey						X			X	X																			X																				
New Mexico						X																																												
New York						X																																												
North Carolina	X	X	X	X	X		X		X			X	X		X			X					X	X	X						X		X																
North Dakota		X		X				X	X	X														X					X																			
Ohio				X		X	X																						X																			
Oklahoma	X		X										X													X	X																						
Oregon		X	X	X					X	X			X			X							X						X		X																	
Pennsylvania	X			X		X			X							X								X			X																					
Rhode Island		X				X	X	X	X																			X	X																				
South Carolina	X																		X		X																												
South Dakota	X		X	X																						X																						
Tennessee	X	X	X					X																					X																				
Texas	X				X	X						X										X										X	X	X															
Utah	X			X	X	X	X	X											X																															
Vermont	X	X	X					X																																										
Virginia	X			X		X	X		X	X			X																													X								
Washington																																																		
West Virginia	X	X	X	X						X						X																																	
Wisconsin				X		X	X																						X																				
Wyoming	X	X	X	X		X																																											

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FACING A DAY IN COURT: A COLLABORATIVE LEARNING MODEL FOR UNIVERSITY PROFESSORS AND SCHOOL PRACTITIONERS

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Facing a Day in Court:

A Collaborative Learning Model for University Professors and School Practitioners

The situations described below created an environment in which practitioners, students, and University professors had to step back and take a reality-check addressing a changing paradigm of educational practice. The result was a total redesign of curriculum and application in the administrator preparation program as it related to coursework in School Law.

Contract Renewal and Abstention: A Nightmare on Employment Issues

As a first year administrator in a small, rural Missouri school district, a beginning principal earned a Ph.D. in educational employment legal issues from an abstention vote of a vengeful board member.

Progressing through the traditional teacher evaluation summaries and the subsequent administrative recommendations for retention of employment, a local fourth grade teacher's name was brought forth for renewal of contract.(*Missouri statute requires four affirmative votes for renewal or extension of employment.)* A lengthy discussion was conducted as to the number of votes this teacher could be provided contingent upon the fact that three of the seven board members were related to her at some level. Three members abstained due to relationship; three members voted in the affirmative for re-employment; one member abstained – no reason provided.

The non-tenure teacher sued the district on the grounds:

1) There was no legitimate cause for action.
2) The board of education vote went against administration recommendation.
3) The non-renewal of contract negated gaining tenure in that district.

Beussink v. Woodland R-IV School District

Offense:

An 11th grade student at Woodland High School in rural Southern Missouri was suspended for ten (10) days for his posted home page, and its display on school grounds and on school property. The student had used vulgar language, was derogatory toward the school district, and addressed the incompetencies of the school staff and faculty. The homepage required the assistance of the business teacher (unknowing of the content) and established a hyperlink to the school district homepage which provided e-mail addresses of school staff/faculty. The student then showed his homepage to other students (while at school and on school equipment) where it was subsequently discovered when a student opened the page in the business classroom planning to place additions on to the website.

Actions:

Due process was provided the student as per "existing school district policy" with the student being issued a five day suspension for the webpage and its contents. Conferencing with the parent and student, the young man exhibited strong behavior, language, and was informed that he would receive a seven day suspension if the behavior did not cease. The student continued this behavior and left the principal's office, whereupon the mother was told the student would receive a ten day suspension for the continued misbehavior. This was not the first time the student had been suspended for overt misbehavior.

The student was in danger of academic failure and was provided opportunity to meet with the attendance committee to address the policy and his situation.

Court Case:

ACLU attorneys became involved in the court case. Their focus during the hearing was to establish injunctive relief regarding the due process rights of the student. The original issue had been the first amendment rights of the student, but then shifted to the due process issue later. The district lost the case on the grounds of . . .

Contextual Basis for Program Redesign

In preparation for this presentation, two thoughts came to mind from other research agendas which are also mirrored in the real world of both higher education preparation programs and the reality of on the job experiences. First, demands for higher standards and concepts encompassed in educational reform mean that we must begin to ask basic questions as to how administrator preparation programs can better provide answers to relative problems by instituting a discourse of current topics and guiding a thoughtful exploration of the ongoing issues. Second, educational accountability must become a shared responsibility. While universities lead in the preparation of students to become effective school leaders, that leadership and influence must begin to extend beyond the formal preparation program. There is a critical need to continue providing ongoing support and guidance as the young administrator progresses through the maze of educational reform and change that is pervasive throughout the current educational arena. Simply stated, the issues are clear.

1) Bring relevancy to the preparation program.

2) Provide service and support to our graduates in their initial years as administrators.

Thinking further through this process of course redesign and instructional delivery model, Deming's work on systemic assessment was brought to bear once more in terms of organizational structure and the endemic problems associated. As Deming observed, most organizational problems are not individual in nature; rather, the problems are derived from the organizational structure itself and, therefore, are chronic. Changing an individual's behavior (in this case, training only the individual administrators in these two cases) would leave the problem unaffected and unremedied. Secondly, Deming suggested that inspection

of one to another was not effective in increasing performance. Again, in the instructional model of school law, we 'tested' and assessed the knowledge base of general and specific elements of the law as it related to educational practice. But the most effective process of consistent, self-analysis was never instilled. The practice of reviewing policy ***as it related to everyday action, procedures, and protocol*** on a yearly (or more frequent) basis was not emphasized. Finally, involvement of all stakeholders has become a mantra for administrator preparation programs; however, with regard to school law, the need for all shareholders to be involved in the policy and practice was not mentioned. Instead, it was assumed that typically the superintendent and school attorney needed to be informed, and the principal should be generally aware of legal issues and implications for specific concerns. The practice of emphasizing ***shared knowledge and shared responsibility*** was not taught. This was the status quo when the two practitioners began their journey into the legal system and its intricacies.

As can be clearly identified in the situations described above, the two practitioners facing these issues and the prospective court cases were inundated with a variety of legal questions. No doubt, to the experienced attorney and/or school administrator, there was little or no doubt that policy analysis, personal preparation of defense, and confidentiality by the administration and board of education would come into play throughout the legal processes to follow. Unfortunately for the principals, their respective school districts, and the attorneys who worked with these districts, the preparation for this kind of situation had not been within the realm of the administrative preparation program through which each of these principals had traveled. Nor, had the Superintendents or Boards of Education been trained in the legal intricacies of either case. Therefore, as they prepared to assist their legal counsel in

addressing the situations, it became incumbent for each of these practitioners to "call for help" and turn to their regional University professors for assistance and guidance in preparing for "their day in court".

In the first case, the first point of concern was that no one seemed to be able to clearly articulate what the degree of relationship could or could not be for employment in the state of Missouri. While the attorney stated explicitly that it was the "fourth degree" of relationship be it "consanguinity or affinity", conveying that information to the requisite board members was seemingly impossible. Second, the young administrator had not been prepared to provide the attorney with precise information from which he could begin to address the situation specifically in the areas of clearly defined parameters and avoidance of interpretations. Third, issues of documentation and follow-up information for case preparation were necessary. What materials to provide, what legal documentation was (should have been) crucial to the defense, and what were the exact legal parameters of the board and administration created grave concern for the practitioner and school district. The teacher's attorneys were (of course) immediately calling the young administrator, bypassing the Superintendent, to demand pertinent information. Media concerns and public relations issues were also creating consternation throughout the school and community. Preparation for the actual deposition and/or court appearance were significant areas of concern for the both the administrator and school district.

The second case had in common all of the above mentioned concerns in addition to the national legal presence, federal court involvement, confidentiality issues of student rights, teachers' rights and responsibilities, and issues of discipline, academic failure, and board policy. Where the original incident in this case initially involved the student's behavior, the

application of existing policy, academic failure or success, and discipline actions ensuing from the behaviors associated with the Internet site, the focus of the entire court proceeding changed to due process and student rights.

Obviously, the school administrators in these cases were looking for guidance, assistance, support, and factual information to which they could hold as a lifeline for survival – both personally and professionally. The respective school districts, likewise, were looking to their principals (directly involved) and superintendents as the leaders in these legal manipulations of their policies, programs, and procedures by which they guided their schools. Based on the problems experienced by the two graduates of the Ed.Admin. program, the Department Chair began to research the applicability of the school law coursework.

The results of this preliminary review showed that the vast majority of the graduate students in the Educational Administration program had a minimal knowledge level as it related to the specifics of contemporary legal issues. Perhaps, even more importantly, it began to appear that within the geographical service area of our University, there existed a large number of situations where there was not a strong core knowledge base regarding board policy, procedures, or modes of operation as related to the legal implications of policy and protocol. Therefore, as educational leaders, the Department Chair felt it incumbent for the Educational Administration Department to redesign the school law course taking an approach which would challenge students not only to learn the landmark decisions, but also to learn how to use the resources and to establish the parameters of the legal framework in which they must work.

Aligning the Course of Study with Reality

To ensure the integrity of the curriculum while maintaining the focus of adequate preparation for practitioners and future administrators, the Chair began the School Law instructional redesign emphasizing the following themes.

1. Maintain the salient features of the traditional program by focusing on key court decisions at the Supreme Court level, both state and federal.
2. Rely heavily upon group process insisting that individuals bring specific resources from their own school districts and participate as a group to work through contrived or actual situations presented within the class.
3. Integrate the case study approach having students identify specific problems, research those issues with regard to their materials packet (resource materials) and present resolutions which were aligned with ***their school district policy or develop appropriate policy*** to address the issue noted.
4. Defend their resolution to the case study scenario by providing legal justification and verification for their decision.

Reflecting upon the environment in which most practicing administrators work in rural southern and southeastern Missouri, the logical conclusion was that several legal or quasi-legal documents naturally established the parameters for the administrators' behaviors. Documents with which students should be absolutely familiar were Board Policy, Faculty handbooks, student handbooks, state code, state activities handbooks, and the few key federal pieces of legislation specifically related to special needs populations and the changing demographics of southern Missouri populations. Upon further reflection, it was concluded that the Civil Rights Acts of 1871 and 1964, ADA, FERPA, Title IX, and other pertinent

federal pieces of legislation were essential to a baseline level of knowledge for the practicing administrator.

Students were asked to locate (within their resource packets) each and every area in which the specific case study components would or could have direct implications. i.e. in a case involving discipline and athletics, the students would need to check all resource documents, policies, protocol, and procedures which would impact the decision affecting the instructional program as well as the total educational community.

Students were assigned to work in groups representing a variety of school districts as they investigate problems written in the case study format. Duties were distributed among group members to ensure a wide assortment of handbooks, both student and faculty, and groups were arranged to ensure a representation of Kindergarten through 12th grade.

Perhaps the most interesting by-product of this approach to the study of school law was the fact that multiple opportunities emerged for individual students and groups of students to not only become familiar with their own policy manuals, but to actually gain practical experience in the writing of new policies for their respective school districts.

An additional by-product was that many of the handbooks were woefully out-of-date and lacked consistency from one level to another, thereby providing the graduate students a challenge unlike many of them had heretofore experienced..

The third area that provided an excellent by-product of learning was that students, as they up-dated and revised their handbooks, and had them reviewed and adopted by their boards of education, were provided opportunities to satisfy a component of the required internship in the section addressing "legal issues".

Fourth, obviously it was an excellent opportunity for students to get a taste or have experiences face to face with the realities of the superintendency/principalship.

In over seventy percent (70%) of the cases, there was direct inconsistency between and among handbooks, policies, and the legal documents which guided the protocol and polices of each school district.

Conclusion

Diminishing expertise by virtue of retirement and attrition present in the current "superintendent' population is a grave concern for Southern and Southeastern Missouri, and may very well be a concern throughout the nation. When faced with this reduction in practical expertise, one begins to carefully review the knowledge base of those who will step in to fill the vacancies of school leaders throughout the country. The reality is that many of the young school administrators do not have the "knocks and bangs" of the retiring leadership team. This was proven to be true in the Southeast Missouri State University service area. Many of the young administrators training to be school superintendents had not lived through the legislation that now significantly impacted their school districts, nor had many of them ever even sat in a court room for a legal action of any kind. The knowledge base, as previously referenced, was dismally low -- not because of a lack of instruction or a lack of effort – simply because of the nature of a changing leadership demographic.

School leaders are much younger in experience and age than in decades past. This occurrence has mandated that institutions of higher education must change our instructional emphasis. Training, initial and on-going, must be based on the "developmental levels", if you will, of the changing demographics in many of the isolated areas throughout the country.

The premises as learned from this experience underlying the need for transition in School Law preparation are as follows.

1. Students in administrator preparation programs need more direct involvement with the legal system, specifically with legal cases which apply to education (This may be partially done through an internship experience.)
2. Great attention must be given at all levels in the district administrative team to policy issues, i.e. internal consistency in all policy documents. Ed. Admin. preparation programs can focus on assisting with this effort.
3. Universities Ed. Admin. Preparation programs need to develop an on-going service component to assist districts with professional development for their leadership team and faculty and staff. (This is not in competition with state school board legal efforts, but in fact, should be in conjunction with those efforts).

Missouri Constitution

Article VII
PUBLIC OFFICERS
Section 6

December 7, 2000

Penalty for nepotism.

Section 6. Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment.

Source: Const. of 1875, Art. XIV, § 13 (as adopted Feb. 26, 1924).

(1964) Acts of officer will not be declared invalid until question of forfeiture has been judicially determined. State v. King (Mo.), 379 S.W.2d 522.

(1967) A county court judge is a "public officer" within the meaning of this section of the constitution. State v. Fletchell (Mo.), 412 S.W.2d 423.

(1976) When sheriff appointed his wife's uncle as deputy sheriff in violation of the constitutional provision which is self-enforcing, he forfeited his office and quo warranto was an appropriate remedy to enforce the resulting forfeiture. State ex inf. Roberts v. Buckley (Mo.), 533 S.W.2d 551.

(1994) Although other county commissioners cast sufficient number of votes to assure appointment, when presiding commissioner of county participated in appointment process by voting for the appointment of presiding commissioner's sister-in- law as trustee of county board (a nonpaying position), appointment violated an antinepotism provision of constitution. State ex inf. Attorney General v. Shull, 887 S.W.2d 397 (Mo. en banc).

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CHART OF RELATIONS

0 SELF Or SPOUSE	1 CHILD	2 GRAND CHILD	3 GREAT GRAND CHILD	4 GREAT GREAT GRAND CHILD
1 PARENTS	2 BROTHER Or SISTER	3 NEICE Or NEPHEW	4 GRAND NEICE Or NEPHEW	
2 GRAND PARENT	3 AUNT Or UNCLE	4 FIRST COUSIN		
3 GREAT GRAND PARENTS	4 GREAT AUNT Or UNCLE			
4 GREAT GREAT GRAND PARENTS				

A husband is related by marriage (affinity) to his wife's relatives in the same way that she is related to them by blood (consanguinity), and she to his in the same manner. But the kindred of spouses are not related to one another. (A brother of the husband is not related to a brother of the wife, etc.

Half relationship is the same as a whole relationship.

Step relationship is the same as a blood relationship.

Disciplining Students for Personal Website Content

By Jeffrey T. Sultanik, Esq.

Q: Can public school districts discipline students for creating a website that contains a hyperlink that enables visitors to access the school's homepage?

A: Probably not. Although there is a dearth of case law addressing this issue, one recent federal court decision from Missouri may shed some light.

In *Beussink v. Woodland R-4 Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998), a federal district court considered a case involving a student's 10-day suspension for posting a homepage on the Internet that criticized the Woodland High School.

The student, a high school senior, created a website at home without using school facilities or resources. The homepage was highly critical of the administration at the high school and the student used vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage. The homepage also invited readers to contact the school principal and communicate their opinions regarding the high school. Of particular note, the student's website also contained a hyperlink that allowed a reader to access the school's homepage.

Upon being disciplined, the student filed a request for a preliminary injunction, claiming the school district violated his free-speech rights under the First Amendment. Specifically, the student claimed his suspension was improper because the content of his website was protected by the First Amendment.

In analyzing the issue, the court applied a four-part test, which examined:

- The likelihood that the student would prevail on the merits of his claim.
- The threat of irreparable harm to the student.
- The public interest.
- Harm to the school if injunctive relief was not granted.

With regard to the first element of the test, the court indicated that there is U.S. Supreme Court precedent demonstrating that students do not shed their First Amendment rights at the schoolhouse gate. Nevertheless, the court also said that the right to free speech is not without limitation, and that schools may limit students' speech only in narrowly defined circumstances.

The court found that disliking or being upset by the content of a student's speech is not an acceptable justification for limiting students' speech on the Internet.

The court further noted that irreparable harm is established any time an individual's First Amendment rights are violated. The court placed weight on the principal's direction to the student to "clean up" his homepage or remove it from the Internet.

It is clear that if other courts adhere to the *Beussink* case, school districts' Internet policies would not have a far enough reach to control speech on a student-created homepage. School districts may, however, have the right to control the following:

- Hyperlinks to a school's homepage. School districts can prevent links to their homepages if they do so uniformly and in a nondiscriminatory manner. Under such circumstances, a school district could conceivably discipline a student or an employee who links his or her homepage to the school district's homepage, regardless of the content of the speech of the student or employee.
- Participation in extracurricular activities. Instead of denying Internet privileges or suspending a student from school as a consequence of Internet-based violations, a school district could take away a student's right to participate in extracurricular activities, since there is no direct entitlement to extracurricular activities. Nevertheless, if First Amendment rights are involved, a court could arguably hold that a student's First Amendment rights are being violated by the deprivation of participation in extracurricular activities.

Additionally, schools may want to consider:

- Reviewing Internet policies that deny students Internet privileges in the event of a violation of school rules. Since the use of the Internet and computers is becoming more and more an integrated part of the curriculum, one has to question the propriety of denying Internet use to a student who violates the Internet policy.
- Reviewing school disciplinary codes, in addition to Internet policies, to determine the extent to which schools can regulate student conduct.

Finally, schools should keep in mind that individual administrators or teachers who may have been the subject matter of criticism on a website could bring a defamation action against the student, if the published material is false. Defamation actions, however, are difficult to bring, especially if public officials are involved. Nevertheless, school employees do not lose all of their rights to individual redress under most state laws.

When First Amendment rights are involved, courts are more likely to side with the student and err in favor of preserving constitutional rights, especially in cases where it is not a district-controlled activity like a school-sponsored newspaper.

When a student acts on his or her own, either in preparing an underground newspaper or creating a critical homepage, prior restraints on free speech probably will not be tolerated by the courts.

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FACING A DAY IN COURT:

A Collaborative Learning Model
for
University Professors and School Practitioners

Built upon "Real-life" Legal Crises

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Action-research took on a new form when two Southeast Missouri school practitioners were faced with legal crises and turned to their training institution for advice, assistance, and support. In the truest sense of the ***Teacher-Service-Scholar*** model, University professors worked with the practitioners and their school districts to prepare for "***their day in court***".

As the intricacies of the state and federal legal system encountered employment and technology issues at the school setting, a unique collegial relationship was created between the practitioner-based University training program and the daily lives of two building level administrators. One employment/tenure lawsuit and one technology/discipline-related court case necessitated the collaboration between University faculty and school districts in need of preparation for defending the school districts' actions. Respectively, the cases dealt with the non-renewal of a non-tenure teacher and the discipline administered to a student for misuse of the Internet. Both cases have been cited in school law classes, in seminars across the state, and the technology case received national attention as published in the ***Wall Street Journal*** and ***Your School and the Law.***

This collaborative model between University faculties and school district practitioners could be described as a problem-based effort involving real situations, the definitive need for pragmatic school law coursework, and the trend toward the changing educational leadership preparation program paradigm. The model addressed two court cases, on in state court and one in federal district court, with culminating decisions which definitively affected the actions, policies, and protocol of many school districts state and nation-wide. As a result of these two court decisions, the study of school law at Southeast Missouri State University in school administrator programs was totally redesigned. This presentation offers evidence that stronger preparation for understanding of the legal system for school administrators as it relates to school district policies (including faculty, student, and activity handbooks) is vital.

THE LEGAL REQUIREMENTS OF TITLE IX IN ATHLETICS

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The Legal Requirements of Title IX in Athletics

Education Law Association

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Introduction to Title IX

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

- 20 U.S.C. § 1681 (a)

Jurisdiction

Enacted by Congress on June 23, 1972, Title IX of the Education Amendments prohibits discrimination on the basis of sex in education programs receiving federal financial assistance.[1] While typically associated with athletics, Title IX equally applies to all aspects of an educational institution, to include: employment discrimination and sexual harassment, admissions, scholarships, recruitment, degree programs, housing, fees, services, insurance benefits, and pregnancy.

1. *Sex Discrimination*: Title IX only prohibits gender discrimination. It does not cover race, age, religious, or any other form of discrimination.

2. *Educational Programs*: Courts have construed this area broadly to include city recreation, elementary, high school, and university sport programs. Title IX, however, does not apply to professional sports, businesses, or state and federal government agencies.

3. *Federal Funding*: An institution is said to receive federal funding if any part of the university receives direct or indirect federal support, such as financial aid to students, research grants, or building funds.

Legal History / Sources of Law

When Congress enacted Title IX, it gave little direction on its interpretation and application. Congress, therefore, appointed the Department of Health, Education and Welfare (DEW),[2] an administrative agency, to oversee Title IX. Over time,

[1] The history of Title IX can be found online at: http://bailiwick.lib.uiowa.edu/ge/history.html

[2] Currently, the U.S. Department of Education is the government agency that administers federal funds for education programs and enforces federal civil rights statutes prohibiting discrimination in programs and activities receiving federal funds. United States Department of Education. [On-line]. Available: http://www.ed.gov/offices/OCR/welcome.html

DEW and Office for Civil Rights (OCR)[3] issued three administrative sources that attempt to provide guidance and understanding in Title IX's applications. The three administrative sources are:

(1) Title IX Athletics Regulation:

In 1975, DEW expressly incorporated athletic programs within the province of Title IX via its Title IX Athletics Regulation (*Regulation*). The *Regulation* states:

> *No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against, in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.*
>
> -34 C.F.R. § 106.41

(2) Intercollegiate Athletics Policy Interpretation:[4]

As with the original Title IX statute, many institutions found the *Regulation* vague. Therefore, in 1979, the OCR issued a Policy Interpretation specifically to address the *Regulation's* provisions. The Policy Interpretation attempts to clarify and explain the factors and standards used to assess Title IX compliance in athletic programs.

(3) Athletic Investigators Manual:

Title IX complaints involving athletic programs are investigated by the OCR. To assist in its investigation process, the OCR in 1990, issued a Title IX Athletic Investigator's Manual (Manual). The Manual provides detailed guidance, standards, explanations, and procedures for assessing Title IX compliance in athletics.

A free copy of the Manual is available at:

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[3] The Office for Civil Rights, a division within DEW, is responsible for enforcing five federal civil rights laws prohibiting discrimination on the basis of race, national origin, sex, disability, and age in programs and activities receiving Federal financial assistance. The OCR resolves complaints of discrimination against education institutions receiving federal funds and targets proactive compliance activities in self-selected school districts, colleges, and universities. In addition to its headquarters in Washington, D.C., the OCR has 12 regional enforcement offices. Id.

[4] While designed specifically for intercollegiate athletics, the general principles and compliance standards set forth in the Policy Interpretation apply to interscholastic athletic programs operated by elementary and secondary school systems, and to club and intramural athletic programs. United States Department of Education. [On-line]. Available: http://www.ed.gov/offices/OCR/interath.html

Office for Civil Rights
400 Maryland Ave., S.W.
Washington, D.C. 20202-1100
(301) 470-1244

The Legal Significance of Each Administrative Agency Provision_____

The three administrative sources issued by DEW and the OCR vary on the deference given by courts. In general, the *Regulation* typically has the force of law unless a court rules it is inconsistent with the original Title IX statute enacted by Congress, an unlikely proposition. Second, while the *Policy Interpretation* does not have the force of law, it has been given substantial deference by the courts because it is a government agency's interpretation of its own regulation. Finally, the OCR's *Athletic Investigator's Manual* is not given substantial deference by courts. In other words, it does not have the force of law and is merely "advisory." The Manual, however, is equally important because it outlines in detail how an institution will be evaluated by the OCR during a Title IX investigation.

In sum, the *Policy Interpretation* and the *Athletic Investigator's Manual* do not technically impose any mandatory legal requirements on an athletic department. These administrative resources, however, are vitally important in Title IX compliance because they attempt to interpret DEW's *Regulation*, an administrative regulation that is given the force of law. Moreover, should a Title IX lawsuit arise, courts typically will rely on all three administrative resources to determine whether an institution has complied with Title IX.

To understand Title IX, therefore, one must fully understand the original statute enacted by Congress, the *Regulation*, *Policy Interpretation*, *Athletic Investigator's Manual*, and the numerous court cases that have interpreted and applied these sources of law.

TITLE IX BASICS

Title IX is divided into three core sections:

1. Athletic Financial Assistance,
2. Other Benefits and Services, and
3. Accommodating the Interests and Abilities of Students

Failure to comply with any portion of a core section violates Title IX. The following are summaries of each core section's requirements.[5]

Athletic Financial Assistance

Athletic Financial Assistance regulates athletic scholarships and other forms of aid provided to athletes. In general, if a school awards athletic scholarships, it must award the scholarships to male and female athletes *in substantially the same proportion* as the number of male and female athletes in the athletics department.

Currently, there is debate on the definition of the term "substantially" and how close the percentages of athletic scholarships dollars and student athletes must be in order to achieve compliance. Originally, Z-test scores were used to determine compliance. These scores allowed up to a 4-5 % disparity, depending on the statistical level of significance. Recently, however, the OCR has stated that female student-athletes must receive scholarship awards within 1% of the same percentage of female student-athletes. If 38% of the student-athletes are females, for example, then approximately 37% - 39% of the scholarship dollars must be awarded to female athletes.

Equivalence in Other Benefits and Services

The second core section of Title IX regulates those areas regarded as "benefits and services" within an athletic program. Benefit and services are measured by quantity, quality, suitability, and availability. Currently, an institution must comply with the following eleven areas:

- Equipment and Supplies
- Academic Tutoring
- Medical Personnel

[5] This overview assumes that females are the underrepresented sex. These scenarios, however, would equally apply to any institution in which men have historically been the underrepresented sex.

- Recruitment
- Scheduling of Games and Practices
- Coaching
- Housing and Dining
- Administrative Support
- Travel
- Facilities
- Publicity

Effective Accommodation of Student Interests and Abilities

The final core section of Title IX contains what is often referred to as the *"three-part test."* It received this name because there are three options an institution may choose from to achieve compliance. In other words, an athletic department must only meet one of the following:

1. The percentage of female student-athletes must *substantially* mirror the same percentage full-time, female, undergraduate students on campus, or

   - *Example:* If 50% of the full-time students on campus are females, then approximately 46 - 54% of the student-athletes must be females.

2. An institution must demonstrate a *recent* and *continued* history of program expansion for females, or

   - *Example*: Over the past 10 years State University has consistently added women's soccer, gymnastics, field hockey, crew, and bowling. Furthermore, State University has not eliminated any women's teams during this 10-year period.

3. An institution must demonstrate that it *fully* and effectively accommodates the interest and abilities of its students.

   - *Example*: Generally speaking, if there is sufficient interest and ability to sustain a women's sport, such as ice hockey, the institution must add it.

Penalties

Title IX is enforced by the OCR. Periodically, the OCR selects a number of institutions and independently conducts compliance investigations to determine their compliance with Title IX. Also, any person can file a Title IX complaint which prompts the OCR into investigative action.

Any institution that fails to comply with Title IX faces several possible consequences. In general, if the OCR identifies an area of non-compliance, it outlines the violations and negotiates a "voluntary compliance agreement." If a university fails to comply with the agreement the OCR has the power to withhold federal funding. No institution to date, however, has had its federal funding withheld.

Other potential penalties for violating Title IX include injunctive relief and monetary damages. Courts, via injunctions, for example, have required institutions to equalize scholarship funding, reinstate teams, create teams, and allow participation on opposite sex teams.[6]

Moreover, if a Title IX lawsuit is filed, a successful plaintiff could receive monetary damages and attorneys' fees. Awards of attorneys' fees in Title IX litigation have reached as high as $1 million dollars.[7]

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[6] *See*, Horner v. Kentucky High School Athletic Association, 43 F.2d 265 (6th Cir. 1994).

[7] *See*, Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

Athletic Financial Assistance

Overview

Athletic Financial Assistance prohibits gender discrimination in the award and receipt of athletic scholarships and other forms of aid provided to athletes. While the original Title IX statute does not mention athletic scholarships, the Title IX Athletics Regulation states that "[universities] must provide reasonable opportunities for such award [of athletic scholarships] for members of each sex in proportion to the number of students of each sex participating in...intercollegiate athletics."[8]

In an attempt to clarify the Regulation's generic description regarding compliance with athletic scholarships, the Policy Interpretation issued its own policy, stating that the "OCR will measure compliance...by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results."[9] According to the Policy Interpretation, the results must be "substantially equal."[10]

Nonetheless, the Policy Interpretation provides little practical help to courts and university administrators who have attempted to determine and measure scholarship compliance. Thus, some courts have turned to the OCR's Athletic Investigator's Manual to further clarify the Policy Interpretation's language.[11] According to the Manual, a university must award athletic scholarships to male and female athletes in *substantially the same proportion* as the number of male and female athletes in its athletics department. Notwithstanding these "clarifications," there remains considerable debate on what "substantially the same proportion" implies. In other words, how close must the percentages of athletic scholarships dollars and student athletes be in order to achieve compliance: 10%, 5%, or 1%?

One-Percent Rule & Z-Test Scores

Originally, according to the OCR's Athletic Investigator's Manual, z-test scores should be used to determine whether scholarship dollars were substantially the same proportion as the number of male and female student-athletes. These

[8] 34 C.F.R. § 106.37(c).

[9] 44 Fed. Reg. at 71,415.

[10] 44 Fed. Reg. at 71,415.

[11] *See*, Title IX Athletics Investigator's Manual, pp. 14 - 20.

scores allow up to a 4-5 % disparity, depending on the statistical level of significance. In a 1998 letter to Bowling Green State University, however, the OCR stated that female athletes must receive scholarships money within 1% of the same percentage of female athletes. If the athletic department is comprised of 52% male student-athletes and 48% female student-athletes, for example, then 47% - 49% of the athletic scholarship dollars must be awarded to the female student-athletes. Further, although the Policy Interpretation suggests that substantial proportionality between the amount of the assistance and rate of participation is the appropriate measure, the court in *Gonyo v. Drake Univ.*,[12] concluded that the over-allocation of financial assistance to female athletes did not violate Title IX.

Non-Discriminatory Factors

Despite the tests described herein, an institution may be in compliance with Title IX, even if there are disparities in proportionality if these disparities result from non-discriminatory factors, such as the cost of in-state versus out of state tuition.[13]

Conclusion

The determination of compliance with Athletic Financial Assistance is unsettled. On one hand the Title IX Investigator Manual appears to base compliance on Z and T test scores which could allow the disparity in athletic scholarships to be as much as 4-5 %. The OCR's Athletic Financial Assistance Guidelines Letter, however, mandates a 1% disparity. Until a court specifically addresses the proper percentage required to achieve compliance, it is perhaps best to assume that the total percentage of athletic scholarships dollars must be within 1% of the total percentage of female student-athletes.

If a university does not award scholarships in accordance to the one percent rule, it does not necessarily mean that the institution does not comply with this section of Title IX. Rather, the university has the burden of proof to demonstrate that the award of scholarships is not within one percent due to legitimate non-discriminatory factors.

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[12] 879 F. Supp. 1000 (S.D. Iowa 1995)

[13] *See*, 44 Fed. Reg. at 71,415; Athletic Investigator's Manual, p. 10.

Equivalence in Other Benefits & Services

Overview

The second core section of Title IX requires equivalence in *Other Benefits & Services*. Currently, this section addresses the following eleven factors[14]:

1. Equipment and Supplies;
2. Game and Practice Times;
3. Travel and Per Diem Allowance;
4. Academic Tutors;
5. Coaching;
6. Locker Rooms, Practice, and Game Facilities;
7. Medical and Training Facilities and Services;
8. Housing and Dining Facilities;
9. Publicity;
10. Support Services; and
11. Recruitment of Student-Athletes.

A school must comply with all eleven[15] factors to achieve compliance. While the Title IX Regulation offers little guidance on the requirements of each factor,[16] the Policy Interpretation provides some evidence of how each factor will be measured.[17] In general, compliance for each benefit and service will be

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[14] Nine of the eleven factors were enacted by the Title IX Regulation. The Policy Interpretation added two more factors, recruitment of student athletes and support services. 44 Fed. Reg. at 71,415.

[15] This list is not exhaustive. Section 86.41(c) permits the OCR to consider other factors in the determination of "equal opportunity."

[16] The Title IX Regulation, for example, states that an institution must "provide equal opportunity for members of both sexes." 34 C.F.R. § 106.41(c)

[17] 44 Fed. Reg. at 71,415-17.

measured by its quantity, quality, suitability, and availability. The following is a more detailed breakdown of the compliance requirements for each factor.

Equipment and Supplies[18]

An institution must provide equitable equipment and supplies. Equipment and supplies include, but are not limited to, uniforms and other athletic apparel (e.g., shoes, warm-up suits, etc.); sport specific equipment (e.g., softball bats, tennis rackets, basketballs, etc); weight / conditioning equipment; and general equipment (e.g., water bottles, knee braces, etc.)[19]

The Policy Interpretation and Title IX Investigator's Manual lists five general measurements to determine equivalent opportunities under this factor:[20]

1. Quality (e.g., condition, durability, etc.);
2. Amount (e.g., number of specific equipment and supplies related to the need of the sport);
3. Suitability (e.g., official game regulation equipment);
4. Maintenance and replacement (e.g., laundry services of the supplies, repair, etc.); and
5. Availability (e.g., amount of time equipment and supplies are accessible).

Game and Practice Times[21]

According to the Policy Interpretation and Title IX Investigator's Manual[22], the OCR will measure four components when determining equivalency with this factor:[23]

1. Number of competitive events per sport;

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[18] 34 C.F.R. § 106.41(c)(2)

[19] *See*, Title IX Investigator's Manual, p. 29-34.

[20] Potential nondiscriminatory factors are listed in the Title IX Athletic Investigator's Manual at 32.

[21] 34 C.F.R. § 106.41(c)(3)

[22] Title IX Athletic Investigator's Manual at 35.

[23] Potential nondiscriminatory factors are listed in the Title IX Athletic Investigator's Manual at 38.

2. Number and length of practice opportunities;

3. Day and time competitive events and practices are scheduled; and

4. Opportunities to engage in available pre-season and post-season competition.

Travel and Per Diem Allowance[24]

The Policy Interpretation and Title IX Investigator's Manual[25] list five components used to measure equivalency with this factor:[26]

1. Modes of transportation;

2. Housing furnished during travel;

3. Length of stay before and after competitive events;

4. Per Diem allowance; and

5. Dining arrangements.

Academic Tutors[27]

This factor is broken into three categories: (1) the opportunity to receive academic tutoring, (2) the assignment of tutors, and (3) the compensation of tutors.[28]

1. There are two factors used to measure the opportunity to receive academic tutoring:

   (a) The availability of tutoring; and

   (b) The procedures and criteria for obtaining tutorial assistance.

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[24] 34 C.F.R. § 106.41(c)(4)

[25] Title IX Athletic Investigator's Manual at 43.

[26] Potential nondiscriminatory factors are listed in the Title IX Athletic Investigator's Manual at 46.

[27] 34 C.F.R. § 106.41(c)(5) & (6)

[28] See, 34 C.F.R. § 106.41(c)(5) & (6) and the Title IX Investigator's Manual at 49.

2. There are two factors to measure the assignment of tutors:

   (a) Tutor qualifications; and

   (b) Training, experience, and other qualifications.

3. There are five factors to measure the compensation of tutors:

   (a) Hourly rate of pay by nature of the subjects tutored;

   (b) Pupil loads per tutoring season;

   (c) Tutor qualifications;

   (d) Experience; and

   (e) Other terms and conditions of employment.

Coaching[29]

This factor determines the availability and assignment of full-time, part-time, and assistant coaches and graduate assistants.[30] There are two factors used to measure the availability of full-time, part-time, and assistant coaches, and graduate assistants.

1. Training, experience, and other professional qualifications; and

2. Professional standing.

Locker Rooms, Practice, and Game Facilities[31]

The Policy Interpretation and Title IX Investigator's Manual[32] list five components used to measure equivalency with this factor:[33]

1. Quality and availability of the facilities for competitive and practice events;

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[29] 34 C.F.R. § 106.41(c)(5) & (6)

[30] See, 34 C.F.R. § 106.41(c)(5) & (6) and the Title IX Investigator's Manual at 55.

[31] 34 C.F.R. § 106.41(c)(7)

[32] Title IX Athletic Investigator's Manual at 64.

[33] Potential nondiscriminatory factors are listed in the Title IX Athletic Investigator's Manual at 66.

2. Exclusivity of use of the facility for competitive and practice events;

3. Availability and quality of locker rooms;

4. Maintenance of practice and competitive events; and

5. Preparation of facilities for competitive and practice events.

Medical and Training Facilities and Services[34]

The Policy Interpretation and Title IX Investigator's Manual[35] list four components used to measure equivalency with this factor:[36]

1. Availability of medical personnel and assistance;

2. Health, accident, and injury insurance coverage;

3. Availability and quality of weight training and conditioning facilities; and

4. Availability and qualifications of athletic trainers and medical staff.

Housing and Dining Facilities[37]

The Policy Interpretation and Title IX Investigator's Manual[38] list two components used to measure equivalency with this factor:[39]

1. Housing provided; and

2. Special services as part of housing arrangements (e.g., laundry facilities, parking places, etc.)

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[34] 34 C.F.R. § 106.41(c)(8)

[35] Title IX Athletic Investigator's Manual at 72.

[36] Potential nondiscriminatory factors are listed in the Title IX Athletic Investigator's Manual at 76.

[37] 34 C.F.R. § 106.41(c)(9)

[38] Title IX Athletic Investigator's Manual at 80.

[39] Potential nondiscriminatory factors are listed in the Title IX Athletic Investigator's Manual at 82.

Publicity[40]

The Policy Interpretation and Title IX Investigator's Manual[41] list three components used to measure equivalency with this factor:[42]

1. Availability and quality of sport information personnel;
2. Access to other publicity resources for men's and women's programs; and
3. Quantity and quality of publications and other promotional devices featuring men's and women's programs.

Support Services[43]

The Policy Interpretation and Title IX Investigator's Manual[44] list two components used to measure equivalency with this factor:[45]

1. The amount of administrative assistance provided to men's and women's programs; and
2. The amount of secretarial and clerical assistance provided to men's and women's programs.

Recruitment of Student-Athletes[46]

The Policy Interpretation and Title IX Investigator's Manual[47] list three components used to measure access equivalency with this factor:[48]

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[40] 34 C.F.R. § 106.41(c)(10)

[41] Title IX Athletic Investigator's Manual at 85.

[42] Potential nondiscriminatory factors are listed in the Title IX Athletic Investigator's Manual at 88.

[43] 44 Fed. Reg. 71,415-17

[44] Title IX Athletic Investigator's Manual at 91.

[45] Potential nondiscriminatory factors are listed in the Title IX Athletic Investigator's Manual at 93.

[46] 44 Fed. Reg. 71,415-17

[47] Title IX Athletic Investigator's Manual at 97.

[48] Potential nondiscriminatory factors are listed in the Title IX Athletic Investigator's Manual at 100.

1. Whether coaches or other personnel are provided with substantially equal opportunities to recruit;

2. Whether financial and other resources are made available for recruitment and are equivalently adequate to meet the needs of the program; and

3. Whether the differences in benefits, opportunities, and treatment afforded to prospective student athletes have a disproportionately limiting effect upon the recruitment of student-athletes.

Conclusion

In sum, compliance with this section is determined by examining the eleven benefits and services as a whole (i.e., the eleven factors in both the men's and women's athletic programs are compared). While identical treatment between the men's and women's programs regarding each benefit or service is not required, the overall effect of a difference between the two programs must be negligible or a result of non-discriminatory factors.[49]

[49] *See*, 44 Fed. Reg. at 71,415. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports (e.g., football equipment), nature of the facilities for competition, or other gender neutral factors (e.g., expenditures that are required because of anticipated crowds, assuming event management equitably supports both programs). A university, however, must make sure it meets the sport specific needs for members of both sexes according to the section. *See also*, the individual non-discriminatory factors listed in the Title IX Investigator's Manual.

Effective Accommodation of Student Interests

The final core section of Title IX, *Effective Accommodation,* requires an institution to "accommodate the interests and abilities" of its students. This means two things:

1. A university must offer sports that address the interests and abilities of its students, and
2. Once a university offers a sport, it must assure that the quality of competition reflects the teams' abilities.

To determine compliance with this section, the OCR measures:

1. How a university determines the athletic interests and abilities of its students,
2. The process and selection of sports offered, and
3. The available levels of competition.

Determination of Athletic Interests and Abilities

There are several methods that a university can use to measure the athletic interests and abilities of its students. No one method is determinative. Generally, as long as a university uses a nondiscriminatory measure the institution has a great deal of latitude to determine its students' interests and abilities. A well-drafted student survey designed to determine the interests in local high schools, club sports, and intramural programs, for example, would be an appropriate instrument to identifying the interest and abilities of the student body. Other acceptable methods include:

1. Interviews of university students, athletes, club and intramural sports, coaches, administrators, and athletic administrators;
2. Surveys of university students, athletes, club and intramural sports, coaches, and administrators;
3. Review of the number of participants in club and intramural sports; and / or
4. Review and surveys of local high school sports.

The Selection of Sports

Title IX does not require a university to integrate all of its athletic teams, nor does it require the choice of sports offered to be identical for men and women. A university, however, may be required to either allow females to try out for a male sport / team or to sponsor an entire female sport / team.

To make this determination, the OCR first categorizes all teams into contact and non-contact sports. Contact sports include basketball, boxing, football, ice hockey, rugby, and wrestling.[50] All other sports, where the purpose or major activity does not involve bodily contact, are considered a non-contact sport. Next, the OCR applies the following standards:

Contact Sports:

If the sport is contact, a separate team must be provided if:

1. The opportunities for female participation in that sport have historically been limited;

2. There is sufficient interest[51] to sustain a viable team;[52] and

3. There is a reasonable expectation of competition for that sport.[53]

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[50] 34 CFR § 106.41(b).

[51] The following are indicators used by the OCR to determine whether an "interest" in a sport exists:

(a) Requests by enrolled or admitted females that a particular sport be added,
(b) Requests by an existing women's club sport that it be elevated to intercollegiate team status,
(c) Participation by women in a particular club or intramural sport,
(d) Interviews with enrolled or admitted females and coaches, and administrators regarding the interest in women sports,
(e) Results of questionnaires of enrolled and admitted female students about a preference of sports,
(f) Participation in sports by admitted female students not yet enrolled at the institution,
(g) Female participation rates in sports in high schools, amateur athletic associations, and community leagues from which the institution draws its students. For example, if an area high school offers a women's sport and the university does not, the OCR will ask the institution to demonstrate that its enrolled admitted female students are not interested in having that sport at the university level.

[52] The OCR has determined that a "viable team" is one in which there is a sufficient number of interested and able students (e.g., a softball team needs a minimum of nine players to participate) and enough available competition to sustain an intercollegiate team.

[53] A university should check its athletic conference, geographic area, and other teams in which it plays in other sports. For example, if two schools in its conference, two schools in its geographic

Thus, most universities would not be required to add a contact sport, such as football, because it is unlikely that: (1) there would be enough interested females to sustain a viable team, and (2) even if there were enough interested participants, there would not be enough available competition. The same scenario would hold true for most, but not all, contact sports. For example, some institutions now offer female ice-hockey, a contact sport originally available only to male student-athletes.

Non-Contact Sports:

If a sport is non-contact, a separate team must be provided if:

1. The opportunities for female participation in that sport have historically been limited;

2. There is sufficient interest to sustain a "viable team";

3. There is a reasonable expectation of competition for that sport; and

4. The female athletes do not possess the skills to be selected for an integrated team with the men, or cannot actively compete if they were selected.

Levels of Available Competition

Institutions must either: (1) provide competitive team schedules equivalently advanced for intercollegiate athletics, or (2) demonstrate a history and continuing practice of upgrading the competitive opportunities to the underrepresented sex.[54]

Three-part Test

The last component of this core section requires universities to meet one of three requirements. This portion is commonly referred to as the "three-part test". In sum, the "three-part test" presents an institution with three separate choices assure that males and females are provided nondiscriminatory opportunities to participate in athletics.

Participants: Before an institution can determine whether it meets the three-part test, however, it must accurately assess who is a "participant in athletics." Typically, all athletes who are listed on a team's squad or eligibility list and are on

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area, and three other competition schools play the sport in question, then it is likely there is a reasonable expectation of competition.

[54] Guide to Title IX & Intercollegiate Athletics (2d). National Collegiate Athletic Association, pp. 42 - 43 1991.

the team as of its first competitive event are counted as participants.[55] Specifically, according to the OCR, participants in athletics are defined as those athletes who:

1. Receive support normally provided to athletes (e.g., coaching, equipment, medical and training room services) on a regular basis during the season;[56]

2. Participate in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

3. Are listed on the eligibility or squad list maintained for each sport, or because of injury cannot meet the above requirements, but continue to receive financial aid on the basis of their athletic ability.[57]

Part One: Substantial Proportionality

Part one of the three-part test is the most easily measured, but likely the most difficult to meet. First, an institution must determine the number of "athletic participation opportunities"[58] available to both male and female athletes and then compare these percentages to the number of full-time male and female undergraduate students enrolled at the institution. In the end, the male and female percentages must be "substantially proportionate" to achieve compliance.

The OCR does not recognize a particular or set statistical percentage to achieve substantial proportionality. Some courts, however, have used a 4% difference between the female student-athletes and student body to equate substantial proportionality. In other words, if the general student body is 55% female, at least 51% of the student-athletes must be female.[59]

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[55] For the purposes of this section of Title IX, an athlete who participates in more than one sport will be counted as a participant in *each* sport.

[56] The OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and concludes on the date of the team's final competitive event.

[57] In the determination of "participants in athletics," the OCR also includes (1) those athletes who do not receive scholarships (i.e., walk-ons), (2) those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and (3) those athletes who practice but may not compete.

[58] As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. For the purposes of this section of Title IX, an athlete who participates in more than one sport will be counted as a participant in each sport.

[59] Because of potential nondiscriminatory reasons (*see* infra) the OCR does not base its sole determination of part one of the "three-part test" on a statistical test alone. Rather, the OCR's decision is made on a case-by-case basis.

Example:

If the student enrollment at State University is 6,000 males (60%) and 4,000 females (40%) and there are 300 male athletes (60%) and 200 female athletes (40%), then "participation opportunities are substantially proportionate to student enrollment" because they are within 4%. Thus, the "three-part" test is satisfied.[60]

The OCR recognizes two non-discriminatory exceptions to the substantial proportionality rule:

1. Natural fluctuation in enrollment and participation rates:

   If, for example, an institution's general student body and athletic department mirror one another (e.g., there are 52% females on campus and 52% of the student-athletes are females) but the following year the female enrollment in the general student body rises to 54%, but participant rates of female student-athletes remained the same at 52%, it might be "unreasonable" to expect the institution to fine tune its athletics program in response to the 2% increase in female enrollment.[61]

2. Only a small number of student athletes would be accommodated:

   The OCR also considers whether achieving compliance would be enough to comprise a viable team. Suppose, for example, that at an institution 54% of the student body are females, but only 47% of its athletes are female — according to the OCR's guidelines, clearly these two percentages are not substantially proportionate. However, suppose the institution also has a small athletic department with only 60 student-athletes. If the institution attempted to comply with Title IX by providing 54% of the athletic opportunities to women (the same percentage as its student population), then approximately only seven additional women would receive participation opportunities. Since seven participants are not enough to support a viable team the institution would still achieve compliance.

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[60] Note: The OCR does not base its sole determination of part one of the "three-part test" on a statistical test alone. Rather, the OCR's decision is made on a case-by-case basis due to potential non-discriminatory factors that could impact the percentages.

[61] It is not known how far the OCR will stretch this general principle. For example, will a 4% or 5%, etc. increase in female enrollment be considered a "natural fluctuations in enrollment?"

Part Two: History of Program Expansion

If a university cannot meet part one, it can measure its "History of Continuing Program Expansion for the Underrepresented Sex." To determine whether a history of program expansion exists, the OCR examines an institution's record of:

1. Adding or upgrading teams to intercollegiate status;

2. Increasing the number of participants; and

3. An affirmative response to a request for additional sports.

First, the OCR will review the entire history of the athletic programs for women. There is no fixed time period in which the OCR looks at to determine what constitutes a "history" of women's athletics. Rather, the OCR will evaluate whether an institution has expanded programs in such a manner that was responsive to the "developing interest and abilities" of women. This means that merely adding a certain number of women's teams is not dispositive as to whether an institution is being responsive to female "interests and abilities." The focus is whether a new team was added in direct response to the interests and abilities of the underrepresented sex (i.e., females) [62]

Second, a university must demonstrate a continuing (i.e., present)[63] practice of program expansion to meet the "developing interests and abilities"[64] of women. This is determined by:

1. Current policies or procedures by which female athletes can request the addition of a new sport and how well this policy is communicated to; and

2. A plan of program expansion that is responsive to the developing interests and abilities of female athletes.[65]

Elimination of teams: If a sport / team is eliminated, the OCR will evaluate the above requirements and determine whether:

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[62] The OCR will not find a history of program expansion simply because an institution increased opportunities for female athletes by cutting men's programs.

[63] The OCR will not find that an institution satisfies this requirement if it merely "promises" to expand its program in the future. Action must be taken.

[64] A "developing" interest includes those interests that already exist.

[65] The OCR would likely find it persuasive if a university monitored the interests and abilities of females via periodic assessments (i.e., surveys) and took timely action in response to the results of its assessments.

1. The elimination of the team "took place within the context of a continuing program expansion for the underrepresented sex which is responsive to their developing interests." In other words, was the program eliminated to add teams that better satisfied the interests and abilities of the underrepresented sex? and

2. Does the institution demonstrate a past history and present/continuing efforts of program expansion?

Part Three: Accommodation of Student Interests and Abilities

If parts one and two of the three-part test are not met, an institution must meet part three to achieve compliance. Part three focuses on whether the interests of female students presently enrolled (and those students who are admitted but not yet enrolled),[66] are being fully and effectively accommodated by the sports the institution presently offers.

In making this determination, the OCR will measure whether there is:

1. An unmet interest in a particular sport;

2. Sufficient ability to sustain a team in the sport;[67] and

3. A reasonable expectation of competition for a team.[68]

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[66] Title IX does not require that "potential" student interests be accommodated.

[67] The following is used to determine whether there is "sufficient ability to sustain a team":

(a) The athletic experience and accomplishments (in intercollegiate, club, or intramural competition) of those enrolled students and admitted students who are interested in playing the sport;

(b) Opinions of coaches, administrators, and athletes at the institution regarding whether interested enrolled and admitted students have the potential to sustain a varsity team; and

(c) If the team has previously competed at the club or intramural level, whether the competitive experience of the team indicated there is potential to sustain an intercollegiate team.

Neither a poor record nor the inability of interested enrolled or admitted students to play at the same level as the institution's other women's athletes is conclusive evidence of "lack of ability." It is sufficient that interested enrolled and admitted students have the "potential" to sustain an intercollegiate team.

[68] A reasonable expectation of competition is measured by:

Arguably, the most significant litigation regarding this section of Title IX is *Cohen v. Brown University.*[69] In *Cohen*, the court ruled that under this component "some" accommodation is insufficient. What is required is "full and effective" accommodation of student interests and abilities.

The *Cohen* court further stated that the mere fact that some female student athletes are interested in a sport is not enough. An institution is only required to offer a sport if there is sufficient interest, ability, and competition to sustain a viable team.[70]

Conclusion

Effective Accommodation of Student Interests allows institutions to comply with one of three prongs. The goal of this section, however, is designed to move athletic departments [71]toward proportionality or fully accommodating the interest and abilities of females on campus.

(a) The available competitive opportunities in the geographic area in which the institution's athletes primarily compete;

(b) Competitive opportunities offered by the schools and conference in which the institution competes;

(c) Competitive opportunities offered by other schools in the same geographic area even though the institution doesn't typically compete against those schools.

If a particular women's sport is not offered in the institution's geographic area due to historical discrimination against women in this sport, an institution may be required to encourage participation in or even implement that particular sport.

[69] 809 F. Supp. 978 (D.R.I. 1992); 991 F.2d 888 (1st Cir. 1993); 879 F. Supp. 185 (D.R.I. 1995); and 101 F.3d 155 (1st Cir. 1996)

[70] Brown University argued that it merely needed to provide athletic opportunities to women in the same or greater proportion than it did male student-athletes. The court, however, rejected this argument. The test is whether women's interests and abilities are "fully" met, not whether an institution provides more opportunities for women than men.

Title IX Compliance: Ten Scenarios to Test Your Knowledge

1. Assume that at State University, 38% of the student athletes are women and 62% are men. If women receive 25% of the scholarship money and men receive 75%, is this a violation of Title IX?

2. In its efforts to comply with Title IX, State University has added the following women's teams over the past 35 years:

   a) Basketball in 1973
   b) Volleyball in 1973
   c) Track and field in 1976
   d) Gymnastics in 1984
   e) Soccer in 1999

   Do these additions comply with the second prong of Title IX's "3-Part Test"?

3. Assume that in addition to the above sports, State University added women's rifle in 1997 and bowling in 1998, but unfortunately had to cut women's swimming due to lack of interest. Is State University in compliance with the second prong of Title IX's "3-Part Test"?

4. Roster management is a relatively new term in Title IX that is synonymous with institutions strictly regulating the number of student athletes so that the ratio of male-to-female athletes aligns with the overall student body (i.e., the first prong of the "3-Part Test"). When using roster management, however, how should institutions count females who play more than one sport according to the first prong of the"3-Part Test"? What if a female athlete participates in a male sport (e.g., wrestling); does the female athlete count toward the male or female roster numbers? Are there any potential downfalls to spring or fall sports when using roster management?

5. Realizing it is behind the times in terms of Title IX compliance, State University assembles a committee on gender equity to recommend a policy and plan of action to achieve compliance by the year 2010. The recommendations include adding the following women's sports:

a) Soccer in 2002
b) Golf in 2006
c) Crew in 2004, and
d) Ice hockey in 2008

In addition, State University agrees to renovate its women's locker rooms in 2003 and build new soccer and ice hockey facilities. Does this plan comply with the second prong of the "3-Part Test"?

6. If a school cannot meet the first two prongs of the "3-Part Test" (i.e. proportionality and continuing history of program expansion) does the school still comply with Title IX if it equally accommodates the overall institutional interest in sport?

7. A recent study found that the marketing dollars spent on men's sports generally provide a higher return on investment compared to dollars spent on women's sports. In other words, $10,000 spent on marketing a men's program will statistically increase the number of new fans more than the $10,000 spent on marketing a women's program. Based on this information, does Title IX's publicity requirements mandate additional dollars be spent on women's marketing until this imbalance is statically equivalent (i.e., within 1 - 2 %)?

8. Do institutions with jumbo replay screens in football stadiums violate Title IX if they do not provide such screens for any women's sports?

9. A loyal university fan is fed up with what he calls "favoritism toward the men's athletic program." Although the fan is not affiliated with the university, he informs the athletic director that "If the university doesn't start treating female athletes better, he's going to file a Title IX complaint in Washington." Legally, could the fan do this? Could he also sue the university?

10. A "friend" of the athletic department wants to donate $500,000 to the men's basketball team. He tells you, however, that "not even a penny of it "can be awarded elsewhere. He also wants to buy the men's basketball team an original team mural of its 1999 NCAA tournament appearance. Ignoring any potential NCAA violations, under Title IX, can the athletic director earmark the $500,000 to the men's basketball team and, (2) does Title IX require the university to purchase a similar mural for the women's basketball team who also made the 1999 NCAA tournament?

THE FREE EXPRESSION RIGHTS OF FACULTY IN THE INFORMATION AGE

COPYRIGHT LAW IN CYBERSPACE: THE IMPACT ON FACULTY OWNERSHIP AND PRODUCTIVITY

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I. **Introduction**

The United States Supreme Court in its decision of Reno v. ACLU, 521 U.S. 844 (1997) ushered in a new era of litigation regarding constitutional rights, especially those of free expression, and the electronic media. The vast majority of public schools, and colleges and universities, have access to the Internet, an international system of electronic communication linking persons all over the world. The World Wide Web, which is a series of documents stored in different computers over the Internet, contains the largest, most advanced single body of knowledge and information; it is, in effect, the largest library in the world. The Reno decision represented a challenge by university professors, library systems, Internet Service Providers, and others to the Communications Decency Act (CDA), 47 U.S.C. § 223 (a)-(h) (1997). The CDA was designed to provide both civil and criminal penalties for the knowing transmission of obscene or indecent messages to any recipient up to eighteen years old and the sending or display of any person up to eighteen years old of any message, "that ... depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." The CDA, hence, was enacted to restrict speech and other expression of Internet users, covering material sent and received.

Reno v. American Civil Liberties Union, 117 S.Ct. 2329 (1997).

> The United States Supreme Court declared that the Communications Decency Act (CDA) violated the First Amendment of the United States Constitution in that it was vague and overbroad. Specifically, the government had failed to provide definitions or precise standards of enforcement for the terms "indecent" and "patently offensive". In addition, this opinion held that the government offered no evidence of what the relevant applicable community standards of "indecency" are in the context of cyberspace. A second part of the opinion found the CDA contained content-based restrictions of otherwise protected speech and applied the "strict scrutiny" test. Even though the government's interest was in shielding minors from access to indecent material, this interest did not outweigh the interest of all minors. Under the Act, some "indecent" or "patently offensive" material would be of literary, artistic or educational benefit and use to older minors. It is important to recognize that this case may stand for the proposition that students may express themselves freely within the electronic media, seen as a marketplace of ideas, and laws suggesting regulation to date have been found unconstitutional.

The decision was greeted with relief by school and college personnel. The Supreme Court in Reno extended the protection of the First Amendment to expression over the Internet and other electronic media. But the result of the case is relatively narrow for professionals: 1) adults do not violate the United States Constitution by engaging in "indecent" communication; 2) adults may exchange "patently offensive" communication; and 3) the Supreme Court struck down a restriction on such expression by private parties over the Internet.

Nowhere is there any indication in the case that the Court addressed expression by educators in their public or "employee" capacity. So, what are the limitations on Internet expression by education personnel within the school/university. What is the authority of education officials to limit school/university-related Internet expression external to the institution?

A somewhat labyrinthine answer at a generic level:

> A university (or public school) does not have to provide faculty or its students with access to the Internet. Practically, however, all universities [and most schools] ... must do so. Indeed, more universities are requiring their students to own computers. Universities also clearly have to provide computers to their faculty because their students have to be computer literate to find jobs, and it is the faculty who will provide those students with that literacy.
>
> Ray August, *Gratis Dictum: The Limits of Academic Free Speech on the Internet*, 10 U. Fla. J.L. & Pub. Pol'y 27, 46 (1998).

For public school personnel the response may be slightly different:

Many states have approved legislation calling for the acquisition of computer equipment for all classrooms as well as the technology training of teachers:

D.C. Code Ann. § 31-2521 (Matthew Bender 2000)

> Provides for the 21st Century Public School Information Technology Program. The program "grants [funds] to all teachers [to] purchase personal computer equipment, program, or updates."

29 Del. Code § 6102A (2000)

> Created the Delaware Technology Account to "provide computer and telecommunications equipment to Delaware's classrooms."

Haw. Rev. Stat. Ann. (Matthew Bender 2000)

> Provides a special fund "that shall be used solely to ... provide equipment and technology ... to improve [all] public schools."

Va. Code Ann. § 22.1-253/13/5 (Matthew Bender 2000)

> "Each local school board shall provide ... a program of professional development in educational technology for all instructional personnel which is designed to facilitate integration of computer skills and related technology in curricula."

Colo. Rev. Stat. Ann. § 22-2-109 (West 2000)

The Colorado Legislature adopted teacher licensure standards as of July 1, 2000 requiring prospective teachers to demonstrate the ability to "integrate technology into instruction at the grade level of which the teacher expects to be endorsed" before receiving a teaching license.

Cal. Ed. Code § 44259 (Matthew Bender 2000)

Beginning January 1, 2000 all teachers seeking licensure must demonstrate "competency in the use of computers ... and effectiveness, of advanced computer-based technology, including the uses of technology in educational settings."

Ga. Code Ann. § 20-2-201 (West 2000)

"Universities and colleges having teacher preparation program ... shall require students in such programs to be proficient in computer and other instructional technology applications and skills including understanding desktop computers, their applications, integration with teaching and curriculum, and their utilization for individualized instruction with classroom management. ... Before granting a renewable certificate to an applicant, [students are required] to demonstrate satisfactory proficiency on ...a test of computer skill competency."

As noted, Reno does not address faculty or other educators in their employment or public capacity. We can agree in this information age that colleges and universities have some quasi-obligation to supply professors with computers and computer training. The state statutes listed place an obligation on school districts and teachers to exchange computer proficiency for licensure. Colleges of Education are brokers in the process. But none of this information addresses faculty rights within employment to freely express oneself through the vehicle of the electronic media. Courts, however, have confronted similar issues regarding academic freedom, and educator rights against the authority of state in its role as sovereign, employer, educator and patron.

II. Academic Freedom

Relative to control of electronic media in educational institutions, a potential conflict might arise when a faculty member's communication is inconsistent with the institution's mission or purpose. This brings forth the issue of academic freedom which denotes the right of educators to create, teach, and produce images and subject matter within their own competence without undue restraints or interference from government officials.

Sweezy v. New Hampshire, 354 U.S. 234 (1957)

The Supreme Court determined that academic freedom was an important issue with First Amendment jurisprudence and teachers and students have a right against attempts by governmental authorities to restrain the pursuit of knowledge and inquiry. In a plurality opinion the Court stated:

> To impose any strait jacket upon the intellectual leaders in the community of American universities would imperil the future of our Nation ... Teachers and students must always remain free to inquire, to study and to evaluate, to gain maturity and understanding ... at 250

In a concurring opinion, Justice Felix Frankfurter borrowed a phrase from two South African justices:

> "It is the business of the university to provide the atmosphere which is most conducive to speculations, experiment and creation. It is an atmosphere in which prevail the four essential freedoms of a university to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study," at 262-63.

Keyishian v. Board of Regents, 385 U.S. 683 (1967)

The United States Supreme Court considered the constitutionality of state plan conditioning university employment on the absence of Communist Party affiliation. In rejecting the state regulation as unconstitutional the Court stated:

> "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that caste a pall of orthodoxy over the classrooms. 'The vigilant protection of constitutional freedoms is nowhere more vital than the community of American schools ... The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues (rather) through any kind of authoritative selection." at 683

The courts have recognized the privilege of academic freedom in both the institution and in faculty.

Regents of the University of Michigan v. Ewing, 474 U.S. 214, 226 (1985)

"Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students ... but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."

The courts have never indicated that academic freedom for faculty serves as a trump card against university or school board authority to create reasonable regulations of educational facilities.

Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503, 507 (1969)

"[W]here state-operated educational institutions are involved, this Court has long recognized the need for affirming the comprehensive authority of the states and school officials, consistent with fundamental constitutional safeguards to prescribe and control the conduct of the schools."

Healy v. James, 408 U.S 169, 194 (1972)

Universities may regulate their facilities and impose time, place, and manner restrictions on free expression in the university environment.

According to one court, where institutional and faculty interests relative to academic freedom conflict, particularly with the use of the Internet over the university's electronic media, the institution may control faculty expression.

Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000)

Six university professors challenged the constitutionality of a Virginia law restricting state employees from accessing sexually explicit material on computers that are owned or leased by the state. In order to gain such access professors had to prepare a written proposal demonstrating that such on-line activity was required in conjunction with a "bona-fide, agency-approved research project or other agency-approved undertaking," that approval must first come from the faculty member's department chair, that approvals had to be in writing, and had to be made "available the public under the provisions of the Virginia Freedom of Information Act. The professors maintained that even if this state law had validity it violated the academic freedom rights of professors. In ruling against the professors the court determined that academic freedom for professors was a professional norm rather than a constitutionally protected right. Moreover, taking a literal interpretation of the decision in Sweezy the court announced that, assuming there is a right to academic freedom, it rests and is only recognized in the institution, and not in professors.

To what extent public school teachers have academic freedom is a source of debate. For the most part, however, "the caselaw does not support the position that a public school teacher has a

constitutional right to academic freedom." Miles v. Denver Public Schools, 944 F.2d 773, 779 (1991). See also, D. Sperry, P.T.K. Daniel, D. Huefner, and E.G. Gee, EDUCATION LAW AND THE PUBLIC SCHOOLS, 16 (1998).

III. Restrictions on First Amendment Free Speech Rights

While it is clear that faculty have First Amendment rights, in public schools and universities, and through expression over the Internet, there is some speech that carries no constitutional protection. These include fighting words, libel/slander and obscenity. In addition, federal law prohibits speech that threatens the physical safety of another person if transmitted in interstate or foreign commerce.

Obscenity

Miller v. California, 413 U.S. 15 (1973)

Obscenity is speech tht the average person applying contemporary community standards would find to: 1) appeal to a prurient interest; 2) depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable state law; and 3) lack serious literary, artistic, political, or scientific value. All three of these then must also be "utterly without redeeming social importance." Roth v. United States, 354 U.S. 476, 484 (1957).

The determination of obscenity, hence, is not based on an absolute process.

Pornography may not be obscene if it does not meet the three-part test above. The exception is child pornography which may be per se obscene. See, Osborne v. Ohio, 495 U.S 103 (1990). The Child Pornography Prevention Act, 18 U.S.C. § 2252 (1997), not only outlaws child pornography using the computer, but also outlaws images of child pornography that are computer generated. This includes photos that are computer generated (without an actual child), and presumably, even animated depictions.

Free Speech Coalition v. Reno, 1997 WL 487758 (N.D. Cal. 1997) (unreported)

A California district court dismissed a challenge to the Child Pornography Prevention Act as impermissible content regulation. The Act prohibits conveying images of children engaged or seemingly engaged in pornographic acts. The plaintiffs argued that their right to punish nudism and to create photos and paintings were infringed, since they did not use actual minors and did not market their works as pornography. They also argued that the legislation would chill valuable speech, such as the creation of medical books to treat adolescent disorders or interpretations of Romeo and Juliet. The court upheld the Act as content neutral and stated that Congress intended the legislation to prohibit

computer alterations of innocent pictures to create pornography that exploited children and encouraged pedophiles and child molesters, even though there was no depiction of an actual child.

Moreover, while there are strong safeguards of faculty expression, there is the equally fervent determination that such rights are not completely unfettered.

Cohen v. California, 403 U.S. 15, 19 (1971)

"The First Amendment has never been thought to give absolute protection to every speaker whenever or wherever he [or she] pleases, or to use any form of address in any circumstances he (or she) chooses."

In a concurring opinion one justice proposed that different principles apply to free expression concerns depending on the role played by the government:

Healy v. James, 408 U.S 169, 201 (1972), (Rehnquist, J. concurring)

"I find the implications clear from the limitations on the government's acting as to enforce its criminal laws ... The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by government upon all citizens."

This means that the degree to which education institutions must permit expression by faculty depends on the particular relationship such personnel have with the state under the circumstances. Generally, personnel have three relationships with the state via the educational institution: 1) that of citizen to sovereign; 2) that of employee with employer; and 3) that of instructor with the state as educator. A new role of the state has also come about more recently, relative to the expenditure of governmental funds for certain kinds of expression. This casts the government in the role of Patron.

IV. **The Public Institution as Sovereign**

The role of sovereign is what we usually associate with a term such as *parens patriae*, which literally stands for "parent of the country". This refers to the government's role under its police power; the government has a sovereign interest in the health, safety, and welfare of the people. " BLACK'S LAW DICTIONARY 1003 (5th ed.1979) (citations omitted).

The state may impose some restrictions on faculty expressive behavior, but not when the teacher is in the role of citizen engaging in passive expression of political or religious beliefs. As such faculty cannot be coerced as citizens into reciting the Pledge of Allegiance, for protesting a war, or singing the National Anthem in order to keep their positions. This, however, is counterbalanced with the government's role to prevent disruptive activities in the school or to

guard against teachers' expression that may have a proselytizing effect upon students against, for example, the recitation of the Pledge of Allegiance or the flag salute. The state has ultimate and complete authority over curriculum and the state may have a legitimate secular purpose of instilling patriotic values in children as part of the curriculum. If this occurs, faculty will be responsible for teaching that curriculum. Sherman v. Community Consolidated School District, 980 F.2d 437, 439 (7th Cir. 1992).

V. **The Public Institution as Employer**

The Supreme Court has emphasized the fact that both students and teachers may engage in the expression of divergent viewpoints that school officials may have to tolerate.

Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969)

> "First Amendment rights, applied in light of the special characteristics of the school environment, are available to ... teachers [as well] ... [as] [i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Nevertheless, state officials may limit the free expression rights of school personnel as a condition of employment.

Pickering v. Board of Ed. of Township High Sch. Dist. 205, 391 U.S. 563 (1968).

> Educators may engage in free expression in schools as long as they are speaking as citizens on a matter of public concern and the expression does not interfere with the administration of the school or is detrimental to the efficient operation of the school or school district.

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

> An educator may be discharged for engaging in expression that negatively effects his/her school if it can be demonstrated by a preponderance of the evidence that the constitutionally protected free speech was not a substantial factor in the decision to terminate.

Connick v. Myers, 461 U.S. 138 (1983).

> When a public employee speaks not as a citizen on a matter of public concern, but, instead, as an employee on matters of personal interest, the First Amendment does not offer protection to challenge the wisdom of a personnel decision by a public agency in reaction to an employee's expression. Where an employee does express a matter of public concern, the public employer's adverse action may

nevertheless withstand a First Amendment challenge if the public value of the statements are outweighed by the government's interest in efficiency.

This triumvirate of cases informs us that in deciding whether First Amendment protection applies to faculty speech or expressive conduct teachers must first meet a two part burden:

1. the speech or conduct was a matter of public concern;
2. the speech or conduct was a substantial factor in the district's adverse action against the employee.

If the teacher meets this burden it then shifts to the employer to show that they would have taken the same action even absent the teacher's protected expression. But, according to the decision in Connick, even if the faculty member's expression was constitutionally protected, the employer's adverse action could still be upheld if it can be proven that the expression: 1) disrupted the efficiency of the workplace; 2) disrupted the close working relationship between the teacher and those he/she criticized; 3) there was a detrimental impact on the administration of the schools; or 4) the performance of the teacher suffered as a result of the expression and its response.

Looking at the decision in Connick, the Supreme Court also made it clear that the First Amendment did not protect governmental employees from even unreasonable adverse employment actions based on speech unrelated to a public concern. In Connick, while the Court recognized that being compelled to work for political campaigns could be seen as a matter of public concern, her termination was still upheld as all of her other expressive conduct was not considered to relate to any "political, social or other concern to the community ...", but was seen as insubordination since it affected the sensibilities of her direct supervisor.

Bonnell v. Lorenzo, 2001 WL 214243 (6th Cir. (Mich.))

The Connick Court's analysis of "mixed speech" , i.e., speech on matters of both personal interest and public concern, was considered in a case where a community college professor was terminated because of the use of profanity in the classroom, the filing of complaints of sexual harassment by students, and retaliation by the professor against the students. The professor circulated to all faculty the complaint by the student as well as information about college disciplinary action toward him. The court deemed most of these expressive activities as matters of public concern. The court determined that this expression, however, was overridden by the college's interest in its sexual harassment policy, in the protection of students who file complaints, and in their official capacity to determine what should take place in the classroom. "Speech that rises to the level of harassment--whether based on sex, race, ethnicity, or other invidious premise--and which creates a hostile learning environment that ultimately thwarts the academic process, is speech that a learning institution has a strong interest in preventing." at *21

The convergence of education and cyberspace is profoundly effected in the employment context since first amendment rights in the electronic media are ill-defined. Images sent and received over the Internet in the education context must relate to a political or social concern and must not be disruptive of the education enterprise or effect professional relationships. This is counter to a conceptional-development view of education and may chill a faculty member's notion of assigning certain work to students.

In Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000), listed above, six professors asserted that a Virginia statute violated their first amendment rights by hindering their ability to perform teaching and research duties using the Internet. One professor alleged that he had declined to assign an online project on indecency law because he feared he would be unable to verify his students' work without violating the state law. Another plaintiff complained that he was inhibited from accessing a database so as to research sexually explicit poetry. Other professors asserted the law prevented research on the human body. The court, using the decisions in Pickering and Connick, engaged in an analysis of whether the speech was a matter of public concern. The court held that the Act regulates speech of individuals speaking in their capacity as state university employees, not as citizens, and thus the Act does not touch upon a matter of public concern.

> "[The essence of Appellees' claim is that they are entitled to access sexually explicit material in their capacity as state employees by using equipment owned or leased by the state.] at 410. The speech at issue here--access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties--is clearly made in the employee's role as employee. Therefore, the challenged aspect of the Act does not regulate the speech of the citizenry in general, but rather the speech of state employees in their capacity as employees. It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way." at 409-10.

The courts have engaged in findings that may have an even greater imperious effect upon the expression rights of faculty when the state is in the role as employer.

Waters v. Churchill, 511 U.S. 661 (1994)

> The Supreme Court upheld a termination of a nurse alleged to have made disparaging remarks about her supervisor and the hospital where she worked. The allegations were made by third parties who claimed they overheard these remarks as the nurse spoke to a colleague. A four-justice plurality held that the government could dismiss an employee for disruptive speech based on its reasonable belief of what the employee said, regardless of what was actually said. In addition, when weighing the value of the employee's speech against the

interference with government operations, the decision also indicated that a government employer need only show that the speech is likely to be disruptive before the speaker may be punished. The test of Waters is such that a government employer may terminate an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this reasonable prediction of disruption and not in retaliation for the speech.

Jefferies v. Harleston, 52 F.3d 9, (2d Cir. 1995)

A professor and chair of the Black Studies department at City University of New York made allegedly made statements about racism and certain ethnic groups in a speech made in Albany. Using the decision in Waters on remand the court determined that: 1) it was reasonable for school personnel to believe that a speech made in Albany could disrupt the efficiency of the University in New York City; 2) the potential interference with CUNY operations outweighed the First Amendment value of the Albany speech; and (3) the department chair could be demoted because university officials feared the ramifications for CUNY.

Webb v. Bd. of Trustees of Ball State University, 167 F.3d 1146 (7th Cir. 1999)

A reasonable belief that an internal dispute between a department chair and faculty would disrupt the teaching and scholarship in an academic department was enough to override the free expression rights of a tenured professor, a non-tenured professor, and an academic aide.

Off-Campus Expression

Beussink v. Woodland R-IV Sch. Dist., 30 F.Supp.2d 1175 (E.D. Mo. 1998)

A high school student's personal homepage was highly critical of the school administration, using vulgar language to convey his opinion regarding the teachers, the principal, and the school's own homepage to which the student's homepage was hyperlinked. The student's homepage also invited readers to contact the school principal and communicate their opinions regarding the school. At trial the court determined that the school's homepage did not contain a link to the student's homepage. The information could be accessed by other Internet users, but there was no evidence that Beusinnk used school facilities or school resources to create his homepage. The court was sympathetic to the necessity of instilling and maintaining discipline and respect for school personnel in the school, but found that the school was not disrupted by the site and hence, caused no school disruption.

It is unlikely, given the decisions in Waters and its progeny that faculty members criticizing their schools through the use of off campus computers with the criticism finding its way to school officials could defend using Beussink. Unlike the decision in Beussink, by stressing that actual disruption is not required, Waters pulls a crucial support column out from under our earlier decision protecting faculty rights.

VIII. **The Public Institution as Educator**

It is arguable that the state's power is at its zenith in its capacity as educator, ie., when school officials are engaged in the transmission of knowledge and societal values to students. Cases addressing the school role as educator do not raise the same constitutional concerns as sovereign or employer. Whether the content of the speech is a matter of public concern is not the issue. Rather, when the state acts as a public educator, courts will determine whether the expression is school-sponsored and whether it bears the imprimatur or endorsement of the school, either by content or by viewpoint. School officials do not have to support teacher expression in the classroom and may restrict such speech provided they assert legitimate pedagogical reasons for doing so.

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 695 (1986).

Upheld the suspension of a student who delivered a vulgar speech at a school assembly. The First Amendment does not prevent school officials from determining that to permit a student's vulgar and lewd speech would undermine the school's basic educational mission. It is perfectly appropriate for the school to disassociate itself to make the point to pupils that vulgar speech and lewd conduct are inconsistent with the "fundamental values" of public school education. The Court here departed significantly from its ruling in Tinker by stressing the need for schools to inculcate in students habits and manners of civility, a civility that requires consideration for others. Hence, schools may determine for students the essential lessons of civil conduct" since inappropriate expression by a student implicates school officials' authority to determine socially appropriate behavior. School personnel may define the kinds of expression by students that are consistent with their own pedagogical objectives. Under *Bethel*, it is plausible to assume that lewd, offensive, indecent, or vulgar material accessed, created, and sent by school students to other students over the Information Highway may be restricted by school officials.

Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986)

The federal Court of Appeals for the Fifth Circuit determined that the First Amendment does not protect a teacher's right to engage in lewd, indecent, or offensive speech or conduct in the classroom. In this case an economics professor was terminated after being warned that he should not use profanity in the

classroom. He argued that his "motivational" speech was not obscene, but only profane and therefore the Constitution protected his speech unless it was disruptive. Citing Bethel the court found such expression was educationally inappropriate. Additionally, the court announced that such a class is a captive audience and students cannot avert their attention from speech which the court claimed served no academic purpose.

Lacks v. Ferguson, 147 F.3d 718 (8th Cir. 1998)

Teacher in a public school permitted profanity in plays developed by students in a creative writing class. When the expression was used by students the teacher neither encouraged nor discouraged the choice of words; she also did not engage the students in a discussion about the use of profanity. Using Bethel the court upheld the dismissal of the teacher stating that "the purpose of the school board's disciplinary policies is to foster, and to reflect the norms and standards of the community it serves."

Perry Educ. Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37 (1983)

A teachers' collective bargaining organization challenged the policy of exclusive use of mail boxes given to a rival, but duly elected, exclusive bargaining representative. In responding, the Supreme Court declared that students, teachers, and teachers' representatives have no exclusive right of access to school property and "the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." at 44. The Court established a three-tier categorization of forums: 1) in a public or open forum, such as found on streets and in park, government may not restrict speech based on content unless it can show that its regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve such interest. The state may, however, impose time, place and manner restrictions that are content-neutral, but must provide alternative channels of communication; 2) in a quasi-open forum or limited public forum, such as the after hours use of school facilities (a place where government does not have to open up its property) expression must receive the same treatment as under an open forum; 3) in a non-public or closed forum the state may place any regulations that assure the forum is used for its intended purposes, as long as the regulation is reasonable and not effected as a means for opposing the speaker's view. "[T]he state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. at 46.

Hazelwood School District v. Kuhlmeier, 44 U.S. 260 (1988).

The Supreme Court recognized the school's broad powers in censuring student

speech in a non-public forum and declared that the school newspaper fell within that context. Schools are not obligated to support or promote student speech that is inconsistent with school purposes. Speech that appears to carry the school's imprimatur may be prohibited if a legitimate educational concern exists. This case stands for the fact that student expression may be curtailed on the authority of a school over curricular issues and a school's obligation to maintain a safe and orderly environment. A school's authority to regulate student rights may depend on the type of expression, whether the expressions falls under the aegis of the school, and whether the expression has a negative impact upon the school's image or interferes with the rights of other students.

The *Hazelwood* decision is applicable to student use of the Internet in public schools. If speech via computers is facilitated as part of a school's curriculum, then it is school-sponsored. Because Internet access in schools is provided primarily for educational purposes, school sponsorship of Internet speech is nearly a given. Furthermore, a school's Internet system will likely be considered a *limited* public forum, similar to the newspaper in *Hazelwood*. As a result, any speech generated over a school's electronic media could easily be attributed to the school. A simple example of *Hazelwood's* application to the Internet is a school newspaper created on computer and "delivered" to the school. Another example may be a message sent outside the school, but linked to school computers so that someone outside the school may believe the message is supported by school officials. Under *Hazelwood*, school districts are likely to have control over such expression.

Loving v. Boren, 956 F.Supp. 953, *aff'd*, 133 F.3d 771 (10th Cir. 1998)

President of university acted to deny access to the university's computers to a large number of Internet newsgroups that were thought to contain sexual images. A policy was put in place where two Internet servers were established, one restricting access to the newsgroups and the other permitting access, but only with age restrictions and certification that access was for academic and research purposes. A professor of journalism, teaching a course on censorship, brought a complaint claiming that the Internet was a public forum and the university, as such, had to provide unfettered access through its computers. The court disagreed pointing out that the proper forum for analysis was the university's computers and institutional officials had the authority to "preserve the property under its control for the use for which it was ...dedicated." at 955. An appeals court upheld the lower court decision since the faculty member presented no evidence that he want to use the computers for any purpose other than academic or educational.

IX. The Public Institution as Patron

In recent years courts have looked at the role of government vis a vis subsiding expression or controlling its own expression. A controversy has arisen under this role based on viewpoint and

whether government actors may make rewards to some and not to others or whether government has an obligation to allow private speakers to have an equal voice with its own.

Rust v. Sullivan, 500 U.S. 173 (1991)

The Court upheld a federal regulation providing for funding for family planning services, but excluding programs where abortion could be used as such a method. A challenge asserted that the regulation conditioned the granting of funds on the weakening of first amendent rights. The Court disagreed stating the Congress could make value judgments through the federal purse strings and not discriminate on the basis of viewpoint since the government does not have to compete with private voices to promote its own programs.

Board of Trustees Of Leland Stanford University v. Sullivan, 773 F.Supp. 472 (D.D.C. 1991)

This case represented a challenge to the decision in Rust. The challenge arose when the Justice Department contended that the government may place free speech limitations on the grant of federal funds to universities. Specifically, professors objected when the grant of funds was predicated on a confidentially clause requiring researchers to give the government notice of intent to publish findings and allowing government to veto any publication it did not agree with. The university sued claiming suppression of speech as a condition of any grant. The court agreed with the university indicating scientific expression carried the same protection as political or artistic speech and the government policy was too broadly tailored as it bound grantees from publishing even related research even if the researcher was being paid only by the university.

NEA v. Finley, 524 U.S. 569 (1998)

The United States Congress amended funding legislation for the National Endowment for the Arts by imposing criteria for funding applications from artists that would "tak[e] into consideration ... standards of decency and respect for the ... values of the American public." The Court took up the question whether government may control expression based on its role as patron or whether art could be funded based on the message government wants t present to the public. Using the backdrop of Rust the Court stated that government decision making, when it speaks in a single voice, can be based on subjective judgment and such decision making by its very nature "does not indiscriminately encourage a diversity of views from private speakers." at 578, Quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 834 (1995). In a concurring opinon Justice Scalia announced that "[i]t is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects". at 598.

Davis v. Los Angeles Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000)

A teacher posted items opposing alternative life styles on a bulletin board opposite a display authorized in his school honoring "Gay/Lesbian Month." When ordered to take down his own display, the teacher claimed a violation of first amendment rights of private, protected speech. The court of appeals ruled that government has a right to control its own speech and that the teacher had no protected right to dictate or to contribute to the content of that speech. The court concluded "that when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards ... but instead is measured by practical considerations applicable to any individual's choice of how to convey oneself: among other things, content, timing, and purpose. Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist. We hold that when the school district speaks through bulletin boards that are not "free speech zones," but instead are vehicles for conveying a message from the school district, the school district may formulate that message without the constraint of viewpoint neutrality."

Bernstein v. United States Department of State, 974 F.Supp. 1288 (N.D. Cal. 1997)

A University of Illinois professor of mathematics developed an unclassified computer program used to encrypt and decode messages transmitted on the Internet. The professor wrote different description, one in English using mathematical formulas and a more precise version in computer language and published his research as part of a process of academic and scientific exchange of ideas. The government brought suit claiming first, that encryption is not protectable speech under the first amendment, but, more importantly, cryptographic computer programs and information for export is wholly the government's business. Relying on the decision in Stanford the district ruled in favor of the professor asserting the encryption is no more than another kind of scientific expression expressly protected by the First Amendment. A three judge panel of the court of appeals for the Ninth Circuit affirmed the decision at 176 F.3d 1132 (9th Cir, 1999).

However, the decision has been withdrawn and a rehearing granted by the court *en banc*. The implication is that the three judge panel did not consider the Finley decision when making its initial ruling.

COPYRIGHT LAW IN CYBERSPACE: THE IMPACT ON FACULTY OWNERSHIP AND PRODUCTIVITY

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Introduction

The Copyright Act, 17 U.S.C. § 201(a), indicates that ownership vests in the author of the work.

So, in education settings, who is the author?

(1) The school or university may claim authorship
- It controls curriculum (K-12, particularly)
- It pays faculty
- It invests in curricular or research materials
- It provides supplies and equipment

(2) Faculty may claim authorship
- Teachers assert some measure of academic freedom
- Independent creation of scholarly work, syllabi, etc.
- Sweat of the brow.

With respect to the creation of course materials and other scholarly work posted and communicated via the electronic media:

(1) Who owns the work created by teachers and faculty? The school or the teacher?
(2) How is this question answered when these works are created and posted on electronic media owned by the school or university?
(3) Does the school have more direction and control?

Copyright Law and Educational Institutions

A. Works of Authorship

Section 102 of the Act recognizes copyright protection in original works of authorship that are fixed in any tangible means of expression. The Act requires that protected works allow communication directly – by way of hard copy – or with the aid of a machine or device (computer and disk).

1. Covered Works
- Literature
- Music
- Dramatic works
- Pictorial works
- Sculpture
- Architecture
- Motion pictures
- Sound recordings

2. ALSO:
   - Computer programs
   - Information on CD-Rom
   - Information produced for distance education
   - Hypertext (for Web documents)

3. For Education:
   - Books and articles are clearly covered
   - Speeches and lectures are not generally protected, unless they are fixed in a tangible medium of expression
   - A silicon chip is a tangible medium of expression. Therefore, computer programs are covered
   - Computer-created works are covered under copyright law once they are saved to disk
   - Jointly-authored works (protection in the undivided whole)
   - Compilations (protection only in the contribution and/or new material)
   - Derivative works (e.g., translation, musical arrangement, condensation) (protection only in the contribution and/or new material)

B. <u>The Exclusive Copyrights</u>

1. Reproduction – in copies or phonorecords
2. Derivative Works – in the right to prepare them
3. Distribution – of copies, by sale or transfer
4. Public Performance – including audio transmission
5. Displays of Work – including video transmission

NOTES:
- These rights apply regardless of the product's tangible form.
- Therefore, they include works in cyberspace and the electronic media.
- Think about each of these rights and how they might apply to works in cyberspace.
- If infringement is easier in cyberspace, then "Fair Use" becomes a fair question to ask.

C. Fair Use

Under Section 107 of the Act, there is no copyright infringement of the work of another author if the purpose of the use is for criticism, comment, news reporting, teaching (including copies for classroom use), scholarship, or research.

The Internet exists, in part, to transport documents to and from users. This point, along with the ease of transporting 100% of the copyrighted work of another, makes fair use a very important issue in cyberspace.

Will this defense work well in cyberspace – for example, when someone uses the computer-created work of a teacher?

1. Fair Use Factors (to be balanced on a case by case basis)

   a. The purpose and character of the use (e.g., education use, commercial purpose, etc.). Commercial uses are presumptively unfair.
   b. The nature of the copyrightd work (e.g., fact or fiction, published or unpublished, etc.)
   c. The amount and substantiality of the portion used (a greater amount used is less fair)
   d. The effect of the use on the potential market value of the original work

   Generally, no factor is more important than the other factors. All are weighed together (But the market effect factor gets a lot of attention).

   There are few reported cases that involve electronic media.

2. A Few Non-Education Cases

   Sega Enterproses v. Maphia (N.D. Cal. 1995). Sega filed suit against several people who owned and operated MAPHIA – an on-line bulletin board that made copies of the Sega video games available for downloading by third party computer operators – for a fee or for barter. As a result, Sega's sales could decrease and the loss could be substantial, both to revenue and to reputation. Sega games are copyrighted. The court weighed each of the four factors in favor of Sega. The purpose of the copies was to save money and to make money. The nature of the work: fiction/fantasy games (not non-fiction). The entire program is copied. Finally, there is a huge market impact.

Playboy Enterprises v. Frena (M.D. Fla. 1993). Frena operates a subscription-based computer bulletin board service. He made available 170 pictures from 50 magazines. Subscribers can download pictures. According to the court, direct evidence of copying was not necessary here, as access to the work and similarity with the work were undenied. Violation of the right to sell and display. Fair use held in favor of Playboy Enterprises. The purpose of the use was commercial. The nature of the work was fantasy/entertainment. On the amount and substantiality, the entire copyrighted work was not used, but essential features of the magazine were used. There is a big market effect.

3. Emerging Issues: Fair Use in Cyberspace

a. Factor Two: The nature of the copyrighted work in cyberspace may be just that – a work in cyberspace – designed for easy transfer from user to user.

b. Factor Three: Works in cyberspace are also designed for full (100%) transfer. Ease of downloading and sending Internet documents makes it easy to incorporate large, verbatim portions of pre-existing works into new ones.

c. Factor Four: The impact of the author's market.
   (1) What is the market for the original work? All of cyberspace? The authors realize this fact. Is this not, at least in part, what the authors want? (Wide readership?)
   (2) On the other hand, the infringer's market is also all of cyberspace
   (3) In the long run, the difference between the hard copy market and the cyber-market may be zero.

D. School Performance or Display

1. Section 110 of the Act

a. In the course of "face-to-face teaching activities", the performance or display of a work is not an infringement.

b. Performance of non-dramatic, literary, or musical work or the display of the work (including electronic transmission) is OK, too, if:
   (1) It's part of the educational program
   (2) Directly related to teaching, AND
   (3) Primarily for use in schools and classrooms

2. "Face-to-Face" and "Teaching Activities" are Interpreted Broadly

a. But "teachers" and "students" may not be interpreted so broadly (they may have to be employed/enrolled in schools)
b. This will help works used in cyberspace
c. The copyright clause of the US Constitution encourages artistic and scientific progress

On one hand, artistic and scientific progress demand the freedom and incentive to protect the creators/authors of new works – including those in cyberspace.

On the other hand this progress is meant to benefit all of society. There ought to be permission to promote long-distance teaching, new works by authors, AND the new medium of communication.

E. Authorship/Ownership: Works for Hire

1. The Work-for-Hire Doctrine

Under Section 201(b) of the Act, the employer is considered the owner/author of a work-for-hire:

a. A work prepared by an employee within the scope of his or her employment, or

b. A work specifically ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

2. Employee v. Independent Contractor: The Reid Factors

According to the Court in Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), if the employer-employee relationship does not exist, then authorship remains with the actual creator of the work. Thirteen factors are considered and weighed in this determination:

a. Right to control the manner and means of production
b. Skill required
c. Source of instrumentalities

d. Location of the work
e. Duration of the relationship
f. Whether the hiring party has the right to assign additional projects
g. Discretion of the hiring party over when and how long the work will take place
h. Method of payment
i. Hiring party's role in hiring assistants
j. Whether the project is a part of the regular work of the hiring party
k. Whether the hiring party is in the business of the hired party
l. Provision of benefits
m. Tax treatment of the hired party

3. The Teacher Exception to the Work-for-Hire Doctrine

Hays v. Sony Corp. of America, 847 F.2d 412 (7th Cir. 1988). Two high school business teachers wrote a word processing manual. The school later asked its new computer supplier, Sony, to write a manual for its computers. Sony used much of the teachers' earlier work verbatim. The District Court held for Sony. The Court of Appeals dismissed the case on procedural grounds, but wrote an opinion supporting the teacher exception. The teacher exception is justified by (1) ancient tradition, (2) the absence in the legislative history to eliminate the teacher exception that had been accepted by previous courts, and (3) the havoc that eliminating the exception would cause in the settled practices of academic institutions.

Williams v. Weisser, 273 Cal.App.2d 726, 78 Cal.Rptr. 542 (1969) (Businessman who employed a student to take notes in Williams' classes). Professor owns copyrights in the class notes because of a lack of university supervision or incentive to copyright, plus undesirable consequences.

Sherrill v. Grieves, 57 Wash. L. Rep. 286 (1969) (instructor taught military sketching, map reading, and surveying sued when he discovered a textbook that infringed an earlier work he had written). Instructor's textbook was not a work-for-hire, as instructor was hired to teach the subject, not to reduce his lectures to writing.

Weinstein v. University of Illinois, 811 F.2d 1091 (7th Cir. 1987). Former professor and co-authors own copyright to scholarly article because of academic traditions.

4. The Teacher vs. the School: Who is the Author?

a. Why teachers and professors should own the works they create.

(1) To promote the spirit of copyright law to "promote the Progress of

Science and the Useful Arts". U.S. Const. art. I, sec. 8, cl. 8.

(2) To maintain the incentive for educators to create in the first place.

(3) Because educators make the decisions without direct supervision from the school.

(4) Because teachers and professors are mobile.

b. Why schools, colleges, and universities should own the works created by their educators.

(1) To allow for a more free flow of information, easier access, and sharing of creations with newer members of the faculty.

(2) So schools should keep the academic benefits and the prestige, while preventing corruption and conflict-of-interest concerns among professors.

(3) To collect revenue from licensing faculty creations.

(4) Because teachers and professors create their educational works on school and university time, with school and university resources, facilities, and salaries.

Authorship, Ownership, and Teacher-Created Materials: Application to Computer-Generated Works

A. Publication and Distribution of Information on the Internet: Associated Copyright Law

1. Audience Restriction

a. Making publications available to subscribers on a mailing list
b. Students in a distance learning course
c. One-to-one emailing

Of course, this is only initial restriction. The minimal control of cyberspace allows initial recipients of the author's works to send them to others virtually undetected.

Infringement is easy. Enforcement is difficult.

The future of author protection is uncertain.

2. Fair Use Returns

The educational purpose of the use may weigh in favor of the alleged infringer. But the amount and substantiality used is also important.

On the Internet, the entire work is often available and can be transferred to any computer operator who wishes to receive it.

But there's not too much case law on this:

Religious Technology Center v. Netcom On-Line Communications Services (N.D. Cal. 1995). The Church of Scientology brought an action against an individual who allegedly posted the Church's copyrighted works on the Internet. The court held that this use was likely not fair. The injunction was granted. Large portions of the work were used, but little criticism from the defendants accompanied it. There was possible harm to the Church's commercial market.

On the four factors:

(1) The claimed purposes were criticism (but not much was written) and transformative use (but not much new material was added).
(2) The nature of the Church's work: much of it was unpublished and was a combination of creative and informational material.
(3) Amount of the work used: All or almost all of some of the works were used.
(4) Market: Not much effect on the market.

B. Authorship and Ownership of Computer-Created Copyrightable Works

Securing copyright protection depends on the identification of authors. But computer users/Internet surfers are nameless and faceless. And communication is quick and often spontaneous.

The lines between compositions, computer programs, and readers' participation are blurred.

As a result, the nature of cyberspace is usually contrary to copyright law.

Must an author, by posting his or her work on the Internet, lose copyright protection and tolerate these blurring lines?

1. Basic Copyright Protection on the Internet

a. The commission on New Technological Uses of Copyrighted Works (CONTU) in 1974 determined that computer programs are protected as literary works. The Copyright Act extends this same protection.

b. But do literary works retain their protections when reduced to computer format?

c. If we combine traditional copyrightable works (literature, graphic arts, audio-visual works) with computer programs, then documents created in hypertext -- a combination of the two -- ought to be protected.

d. Hypertext is revolutionizing research and publishing. Papers, reports, outlines, and presentations can be distributed through computer networks quickly and inexpensively. Hypertext is easily updated, and research -- via databases and linked documents -- is more efficient.

2. Authorship and Ownership on the Internet

a. The general lack of control over the Internet permits rampant infringement of the rights of authors who post creations on the Net.

b. Authors who have full copyrights in hard copy may lose these rights on the Net.

3. Allocation of Credit among Authors -- External Concerns

Does an author share copyright credit with the distant author of a linked work?

Does it make a difference whether the authors intended this linking?

a. Joint Work. Each author gets an undivided interest in the entire product. But the authors must intend for there to be a joint work (17 U.S.C. § 101).

b. Collective Work. Each author owns only his or her contribution. The publisher of an Internet magazine may re-post an earlier article, but may not alter it or move it to another magazine.

c. Derivative Work. Only the additions belong to the new author (e.g., translations of hard copy to a document in hypertext).

4. Allocation of Credit among Authors -- Internal Concerns

The work-for-hire doctrine may apply just as harshly to teachers and professors in cyberspace. Hypertext authors, beware!

The teacher exception may apply as well, though.

Aymes v. Bonelli (2d Cir. 1992). Aymes was hired by Bonelli to be a computer programmer for Island Recreational, a swimming pool company. Bonellli directed Aymes to program, but Bonelli was not a programmer. Aymes used company equipment, but worked alone, with autonomy. Aymes received no health benefits; sometimes, her was paid hourly, sometimes not. Aymes left when Bonelli cut his hours.

Aymes registered the programs through the Copyright Office, and then filed suit against Bonelli for infringement. The court applied the Reid test. Not all of the factors were relevant; nor were they given equal weight. According to the court, Bonelli retained the right to control and the right to assign other projects, but Aymes retained the skills and received no health benefits and did not have the tax treatment of an employee. The court found that Aymes was an independent contractor and held for Aymes.

Avtec Systems v. Pfeiffer (4th Cir. 1994). Avtec markets space-related computer services and products to the federal government. To enhance the company's orbital simulations (one of its services), Pfeiffer worked full-time for Avtec. After the program was written, Avtec wrote a non-disclosure confidentiality policy. Pfeiffer allowed another company to use the program, and Pfeiffer received money for it. Avtec registered the Copyright and sued Pfeiffer.

The court applied a two-part test. On the question of whether Pfeiffer was an employee, the court held that he was. On the question of whether Pfeiffer was acting within the scope of his employment, there are three elements: (1) Is he performing the kind of work he was hired to perform? (2) Does the work occur substantially within the time and space limits? (3) Does the work occur, in part, to serve the employer? The district court held for Pfeiffer, on the rationale that employers do not get the presumptive favoritism they once did. The court of appeals vacated and remanded for a decision on the basis of "broad public access" as opposed to creation on the basis of "individual initiative". But there remains no presumptive favoritism for employers.

5. Application to Education

The "outside of the scope of employment" argument may not work. It is widely known and accepted that teachers and professors spend many hours off the traditional working clock and many hours away from the physical place of business. But this work is likely still within the scope of employment.

PAULKEN + DANIEL, Copyright Law in Cyberspace
Education Law Association, March 17, 2001

Case Citations

1. Sega Enterprises v. Maphia, 857 F.Supp. 679 (N.D. Cal. 1995).
2. Playboy Enterprises v. Frena, 839 F.Supp. 1552 (M.D. Fla. 1993).
3. A+M Records v. Napster, No. 00-16401, No. 00-16403
   2001 U.S. App. LEXIS 1941 (9th Cir., Feb. 12, 2001).
4. Religious Technology Center v. Netcom, 923 F.Supp. 1231 (N.D. Cal. 1995)
5. Aymes v. Bonelli, 980 F.2d 857 (2d Cir. 1992).
6. Avtec Systems v. Pfeiffer, 805 F.Supp. 1312, aff'd in part,
   21 F.3d 568 (4th Cir. 1994).

ZERO TOLERANCE OR (IN)TOLERANCE POLICIES?

DUE PROCESS AND THE LAW OF STUDENT SUSPENSIONS AND EXPULSIONS: AN EXAMINATION OF *FULLER V. DECATUR PUBLIC SCHOOL BOARD OF EDUCATION SCHOOL DISTRICT 61*

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ABSTRACT

In response largely to perceived increases in school crime, zero tolerance school discipline policies began to slowly emerge in U.S. public school districts across the country beginning around 1995.[1] The implementation of zero tolerance policies in U.S. public schools across the nation has increased considerably in the wake of the nationwide media coverage of school communities, such as Jonesboro, Littleton, and Columbine. As a result of heightened pressure from largely the media and the community-at-large, school administrators have been directed to develop and enact school policies, such as zero tolerance school discipline policies, in the hope that these polices will ensure student and school staff safety against violent acts, including the use of weapons, fighting, and verbal threats. This paper examines zero tolerance policies largely in relation to its legal implications upon the law of student suspensions and expulsions. More specifically, this essay will examine and discuss a recent case, *Fuller v. Decatur Public School Board of Education School District 61*, which drew national media coverage largely due to Reverend Jesse Jackson's decision to challenge the Decatur School District's two-year out-of-school expulsion of six African-American male high school students as a result of their admitted involvement in a stands-clearing brawl on September 17, 1999 at a high school football game.[2] Last year's *Fuller* decision highlights some of the inherent limitations of contemporary zero tolerance policies and court interpretations of student due process and equal protection, including scant attention to substantive due process student claims, the need for the court's increased acceptance of adverse impact claims of racial discrimination in school discipline policies using statistical analyses, and significant efforts to create more uniform and reliable school discipline data collection and dissemination procedures at the local and state levels.

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[1]Originally, the term "zero tolerance," which refers to policies that punish all offenses, no matter how minor, developed in the 1980's from state and federal drug enforcement policies. In fact, in 1988 former U.S. Attorney General Edwin Meese gave authorization for U.S. custom officials to seize boats, automobiles, and passports of anyone passing the border with even trace amounts of drugs. After threats of suit for violations of constitutional rights by the American Civil Liberties Union, the U.S. Customs Service discontinued their zero tolerance practices in 1990. In 1994, President Clinton signed the Gun-Free Schools Act. With the passage of the Gun-Free Schools Act, this law mandated both a one calender year school expulsion and student referral to the criminal or juvenile justice system for any student in possession of a firearm. Originally, the term "firearm" in the Gun-Free Schools Act referred exclusively to firearms, such as handguns and/or rifles. Subsequent amendments and individual state polices have expanded the definition of "firearm" in the Gun-Free Schools Act to include any instrument intended to be used as weapon.

[2]Fuller v. Decatur Public School Board of Education School District, 78 F.Supp.2d 812 (C.D. Ill., 2000).

INTRODUCTION

> As school officials struggle to deal with zero tolerance policies, they are thrust into positions as disciplinarians who mete out punishment for students, while also wrestling to find ways of handling student use of drugs and possession of weapons on campus. The immediate issue for educational leaders, then, becomes determining their role in formulating appropriate policies to deal with violent and disruptive students, based on legitimate public concerns over the epidemic of incidents in schools and the backlash against draconian zero tolerance policies.[3]

Recent U.S. school shooting tragedies in communities such as Santee, California;[4] Littleton, Colorado[5]; Springfield, Oregon[6]; Jonesboro, Arkansas[7]; West Paducah, Kentucky[8];

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[3]Charles J. Russo and Timothy J. Ilg, (January 9, 2001). Zero Tolerance Polices: Are they efffective? *School Violence Alert*

[4]The most recent school shooting occurred on Monday, March 5, 2001 when 15 year-old, Charles Andrew Williams, a student at Santana High School killed two classmates and wounded 13 others.

[5]The Columbine High School shootings of April 20, 1999 represent the most deadliest U.S. school shooting. Columbine students, Eric Harris and Dylan Klebold, killed a total of twelve students and one teacher; wounding twenty-tree others at Columbine High School. Additionally, at the end of their shooting rampage, both Harris and Klebold, turned their guns on themselves.

[6]On May 20, 1998, fifteen-year old Kip Kinkel killed his parents. The next day, May 21, Kinkel killed two students and injured twenty-two others when he started shooting in the cafeteria of Thurston High School. In September 1999, Kinkel pled guilty to four counts of murder and twenty-five counts of attempted murder with a firearm.

[7]Westside Middle School students, Mitchell Johnson, thirteen, and Andrew Goldren, eleven, shot and killed four students and one teacher and wounded ten others during an evacuation from a false fire alarm from which they fired their guns from nearby woods.

[8]On December 1, 1997, during a prayer circle at Heath High School, three students were killed and five wounded when a fourteen-year old boy shot them

Pearl, Mississippi[9]; and others[10] have required many school districts across the country to reevaluate their school discipline polices and practices directed at responding to and preventing violence in schools.[11] The issues surrounding student discipline, namely student misconduct, continue to be a persistent and difficult problem for educators. There is generally widespread agreement among students, parents, educators, and policymakers that school safety is a critically important issue. Moreover, there is an equally strong consensus for legitimate calls for preventative measures directed at facilitating a safe school environment.

While it is undeniable that the past few year's string of school shootings has left an indelible scar on America's educational community and developed a renewed and vigilant "call to action" to reduce school violence, does the American public's perception of violence mirror the reality of the degree of violence found in our nation's schools? Recent empirical data from the U.S. Department of Education suggests that there is a definite mismatch between the U.S. public's perceptions versus the reality of the degree of violence in our nation's schools. The truth is that our public schools constitute one of safest places for our children and youth. On February 18, 2000, William Modzeleski, Director, Safe and Drug-Free Schools Program, U.S.

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[9]On October 1, 1997, sixteen-year old, Luke Woodham shot and killed two students and wounded seven at Pearl High School. Before leaving home that morning for school, Woodham beat and stabbed his mother to death. Woodham was sentenced to two consectutive life sentences for the death of his two classmates; in a separate trail, he received a life sentence for the murder of his mother.

[10]Other notable shootings on school grounds include the following: On March 1, 2000, in Mount Morris Township, Michigan, a six-year old boy was accused of fatally shooting his first-grade classmate; On May 20, 1999, six students were injured by gunshot wounds fired at Heritage High School in Conyers, Georgia by a fifteen-year old student who was reportedly depressed over breaking up with his girlfriend; on May 19, 1998, in Fayetteville, Tennessee, one male student was killed in the parking lot of Lincoln County High School by a disgruntled ex-boyfriend. The victim was dating the ex-girlfriend of the shooter; On April 24, 1988, a fourteen-old student at James W. Parker Middle School shot and fatally wounded one teacher and wounded two students; On February 19, 1997, in Bethel, Alaska, a principal and one student were killed by Evan Ramsey, sixteen, at the high school; on February 2, 1996, in Moses Lake, Washington, fourteen-year old Barry Loukaitis, shot an killed two students and a teacher in a classroom

[11]More recent statistics from the National Center for Education Statistics (NCES) and the Bureau of Justice Statistics (BJS) detailing the number of violent deaths in our nation's public schools indicate that from the period of July 1, 1997 through June 30, 1998, a total of 60 school-associated violent deaths occurred in our nation's schools. By comparison, 2,752 children aged 5 through 19 were homicide victimes in the United States from July 1, 1997 through June 30, 1998.

Department of Education, stated, "An overwhelming majority of schools (90 percent) do not experience any serious violent crime, and nearly half of all our schools (43 percent) experience no crime at all."

More specifically, in a recent U.S. Department of Education report, *Violence and Discipline Problems in U.S. Public Schools, 1996-97*, a survey was taken based on a nationally representative sample of 1,234 school principals at the elementary, middle, and high school levels.[12] In this survey, principals were asked to list what they considered to be serious or moderate problems in their own schools. The results of this national survey of U.S. public school principals indicated that the most frequently cited "problems" at all school levels were tardiness (40%), absenteeism (25%), and physical conflicts between students (i.e. fist fighting without weapons). The critical "school violence" issues that usually comprise the focus of the mainstream media and school safety debates were reported to be at least a "moderate problem" very infrequently in the survey; drug use (9%), gangs (5%), possession of weapons (2%), and physical abuse of teachers (2%). Overall, in this National Center for Education Statistics (NCES) report, violent crimes in U.S. public schools occurred at an annual rate of 53 per 100,000 students.

Recently, a volatile debate has surfaced in our schools concerning the uses and potential abuses of "zero tolerance" policies in our nation's schools as a remedy to significantly reduce incidents of school violence.[13] Basically, the initial use of zero tolerance policies in the nation's schools were a direct result of laws originally centered on the most dangerous and criminal behavior by students.[14] Within a very short time after the passage of the 1994 Federal Gun-Free Schools Act, however, local school boards and administrators began to exercise wide discretion

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[12]*Violence and Discipline Problems in U.S. Public Schools: 1996-97* (Washington, D.C. National Center for Education Statistics (NCES), NCES 98-030, 1998.

[13]Zero tolerance policies as defined by the U.S. Department of Education as school discipline policies that "mandates predetermined consequences or punishments for specific outcomes."

[14]This "highly selective" use of zero tolerance policies in schools was a result of Congress' passage in 1994 of the Federal Gun-Free Schools Act, 20 U.S.C. §8921; a law requiring states to pass legislation requiring a one-year suspension for students carrying firearms on school property. A state's failure to comply with the Federal Gun-Free Schools Act would result in loss of federal funding.

in the use of zero tolerance policies, applying these laws to others weapons, the possession or use of drugs, and a host of other types of student behaviors that many would argue cause no serious threats or safety concerns to schools.[15] In the wake of the increased use of zero tolerance policies by schools across the country, there has also been a corresponding increase in the number of student suspended and expelled.[16] In the 1998 school year, for example, more than 3.1 million students were suspended and approximately another 87,000 students were expelled.[17]

The media's widespread coverage of recent school shootings coupled with the general public's misperceptions of the actual degree of violence in the nations's has led many schools toward a "take no prisoners" approach toward school discipline. As a result of these troubling incidents, school safety concerns have become critically important policy issues in our nation's schools. Yet, in our commendable quest for safer and violence-free schools, teachers, school administrators, researchers, and policy makers need to be mindful of the ultimate goal of safer schools, which is the proper balancing of school disciplinary related rules and polices with the constitutional provisions and safeguards, such as equal protection under the law for each member of our school communities.

In order to significantly reduce serious crime offenses in the nation's schools, several state legislatures voiced the need for legal mandates that called for strict school disciplinary sanctions for dangerous and criminal behavior by students, especially relating to the possession of firearms on school property. Eventually, the collective concerns of these state legislatures became a realization with the 1994 passage by Congress of the Federal Gun-Free Schools Act, 20 U.S.C. §8921, which required all U.S. states to pass legislation mandating a one-year school

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[15]In 1999, for instance, the state of Maryland's public schools (excluding Baltimore City, the largest district) suspended approximately 44.000 students for the non-violent offenses of "disobeying rules," "insubordination," and "disruption."

[16]*See* Colorado Foundation for Families and Children, *School Expulsion: A Cross-Systems Problem* (Denver, Colorado: Colorado Foundation for Families and Children, 1995).

[17]*See* U.S. Department of Education, Office for Civil Rights, *Fall 1998 Elementary and Secondary School Civil Rights Compliance Report: National and State Projections,* June 2000.

expulsion for any student found carrying firearms on school property.[18] Shortly after the passage of the Federal Gun-Free Schools Act, which called for the mandatory expulsion of students found possessing firearms on school grounds, many school administrators began to expand greatly the scope of legitimate school expulsions under the Federal Gun-Free Schools Act to include, weapons other than firearms, the possession and/or use of drugs, and more recently, issues that fall loosely under the category of school disruption, such as fist fighting and verbal abuse.

Officially, the U.S. Department of Education defines school discipline "zero tolerance" policies as a policy that "mandates predetermined consequences or punishments for specific offenses."[19] When the 1994 Gun-Free Schools Act was enacted into law requiring each state to enforce both a one-year expulsion for any student who brings a firearm to school and a referral to the local criminal or juvenile justice system, zero tolerance policies were initially conceived as a way to minimize school violence and contribute generally to a more conducive learning environment for schools.

While some applaud and attribute the use of zero tolerance school discipline policies with increasing and maintaining safe and productive educational environments for students and staff, others contend that zero tolerance polices are ineffective, as well as educationally and psychologically detrimental school policies that disproportionately impact students of color, namely African-American and Latino/a students, and students with disabilities, enrolled in special education classes.[20] While it is fairly inevitable that disagreements concerning the viability of zero tolerance policies will more than likely continue, the courts and existing case law are clear in pointing out that U.S. public school districts have considerable authority and latitude when it comes to controlling student behavior through the use of use of school

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[18] Failure to comply with the Federal Gun-Free Schools Act would result in a loss of federal funding.

[19] *See* U.S. Department of Education, National Center for Education Statistics (NCES) and U.S. Department of Justice, Bureau of Justice Statistics, *Indicators of School Crime and Safety, 1999*, Appendix A, Table A1, September 1999.

[20] *See* Patrick Pauken and Philip T.K. Daniel, Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis, West's Education Law Reporter Vol. 139, 2000.

disciplinary suspensions and expulsions. Moreover, numerous federal and state courts have reiterated the minimized role of the courts, especially at the federal level, in court cases involving student discipline issues.[21] While the legitimate authority of school administrators to enforce student discipline policies in their respective schools is significant, the distribution and allocation of student discipline through suspensions and expulsions must be wielded in such a way that affected students are afforded their constitutional rights to due process.

Even prior to the federal government's passage on the 1994 Gun-Free Schools Act, zero tolerance policies were beginning to be widely interpreted by school administrators to cover not only firearms, but drugs, including tobacco-related offenses and school disruption issues, such as weaponless fighting and verbal threats. For example, in 1989, public school districts in both Louisville, Kentucky and Orange County, California, promulgated zero tolerance policies that applied not only to the possession of all types of weapons, but also students in the possession of drugs or known to be affiliated with gangs or gang-like activities. Interestingly, while the passage of the Gun-Free Schools Act into law provided the federal government with a legal mandate of a one-year suspension for students found in the possession of a firearm, this provision included the stipulation that the one-year student expulsion could be modified by the "chief administrative officer" of each local school district on a case-by-case basis.[22]

THE IMPACT OF "ZERO TOLERANCE" ON SCHOOL DISCIPLINE: ARE ZERO TOLERANCE POLICIES EFFECTIVE?

The year 2001 marks the seventh year since the passage and enforcement of the Federal Gun-Free Schools Act. While principals and superintendents have used their discretionary authority to implement zero tolerance policies in schools, considerably less time and attention has been paid to the issues surrounding whether or not zero tolerance polices are effective in

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[21] *See* Wood v. Strickland, 95 S.Ct 992 (1975), Anita J. Northfield Township-Glenbrook North High School District 225, 1994 WL 604100 (N.D. Ill. 1994), Lamb v. Panhandle Community Unit School District No. 2, 826 F.2d 526, 530 (7th Cir. 1987), Parker v. Parker v. Trinity High School, 823 F.Supp. 511, 521 (N.D.Ill.1993).

[22] Skiba and Peterson, p. 373.

decreasing school violence levels. In fact, there is virtually no data that suggests that zero tolerance policies effectively reduce school violence levels. According to experts on issues of school violence, the best available measure of the impact of zero tolerance on school violence is the U.S. Department of Education, National Center for Education Statistics (NCES) and the U.S. Department of Justice, Bureau of Justice Statistics (BJS), *Indicators of School Crime and Safety 1999* report, which after four years of implementation, indicates schools that utilize zero tolerance policies are still less safe than those schools without zero tolerance policies. Moreover, this relative lack of data is further compounded by inconsistent and, in some instances, unreliable school discipline data collection at the school district and state levels.(See Appendix C).[23] In order to properly monitor zero tolerance polices, more consistent and reliable school discipline data collection and reporting procedures need to be in place. For example, only 27 states require collection of discipline data by type of offense/conduct, 11 states require collection of school discipline data by race, and 11 states require collection of school discipline data by gender.

Both suspensions and expulsions are two of the most commonly and frequently used disciplinary measures by school boards and administrators to deal with student misconduct infractions. Increasingly, suspensions and expulsions are becoming the "weapons of choice," by school board members and administrators in their hopes to create and maintain safer schools.[24] In the wake of the increased use of zero tolerance policies by schools across the country, there has also been a reported increase in the number of student suspensions and expulsions nationwide.[25] In the 1998 school year, for example, more than 3.1 million students were

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[23]As indicated in the Civil Rights Project at Harvard University and the Advancement Project's report, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, there is constant confusion in many State Department of Education as to what is the proper agency or agencies in charge of reporting school discipline data.

[24]*See* Jessica Porter's article, *Districts Turn To Expulsions To Keep Order* ,Education Week on the Web, (April 19, 1995) <http://www.educationweek.org/ew/vol-14/30suspen.h14>

[25]*See* Colorado Foundation for Families and Children, *School Expulsion: A Cross-Systems Problem* (Denver, Colorado: Colorado Foundation for Families and Children, 1995).

suspended and approximately another 87,000 students were expelled.[26] In Wisconsin, one of few states that has comprehensive school discipline data on suspensions and expulsions by race, gender, and type of offense, school suspensions have increased approximately 34% since the 1991-92 school year; 25.5% of African American males and 19.75% of Native American males were suspended in the public schools of Wisconsin during the 1997-98 school year.[27] At the local level, in school districts of varying sizes, especially those with large numbers of students of color, the impact of zero tolerance policies on suspensions and expulsions has been especially acute. In 1999, in Jefferson County, Florida, a small, predominately African American school district, approximately 43% of high school students and 31% of middle school students were suspended at least once.[28] In larger U.S. public school systems, such as the Chicago Public Schools, in the period from 1992-93 through 1998-99, there has been a dramatic reported increase in the number of student expulsions; 14 in 1992-93 to 737 in 1998-99.[29]

Since the implementation of zero tolerance policies, numerous studies have indicated that the number of students, particularly students of color, suspended and expelled from schools has steadily increased.[30] Data from the U.S. Department of Education's report, *The Condition of Education 1997*, revealed that approximately 25% of all African American males nationally were suspended from their school at least once over a four-year period spanning 1993 through 1996.

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[26]*See* U.S. Department of Education, Office for Civil Rights, *Fall 1998 Elementary and Secondary School Civil Rights Compliance Report: National and State Projections*, June 2000.

[27]The Civil Rights Project at Harvard University and the Advancement Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, June 2000, p. 3; State of Wisconsin, Department of Public Instruction, "School Discipline-Suspensions," *Education at a Glance*, April 1999.

[28]Florida Department of Education, *School Indicators Report*, 1999.

[29]*Suspended Education: A Preliminary Report of the Impact of Zero Tolerance on Chicago Public Schools*, Generation Y, a project of the Southwest Youth Collaborative, Chicago, Illinois, citing Chicago School Reform Board of Trustees, *Chicago Public Schools: FY 2000 Final Budget*, Schools and Regions Objectives.

[30]Consistent longitudinally-based research over the past two decades has shown that students of color, particularly African American students, have been disproportionately disciplined in schools compared to white students.

In another national study conducted in 1993, David Stone surveyed several hundred thousand students across the country and found through the results that African American students were either suspended or expelled at a rate 250 percent higher than white students.[31]

Some of the more troubling information regarding the disparate suspensions and expulsions of students of color as well, as students classified with disabilities, is evidence, which supports the conclusion that many of these children are being disciplined unfairly and arbitrarily suspended and expelled for incidents that otherwise could have been handled using alternative methods. In a recent report, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment,* Russ Skiba, director of the Institute for Child Study and a professor at Indiana University, found that when all socio-economic indicators are held constant, African American children are still suspended and expelled at higher rates than white students at the same schools; moreover, results from Skiba's study indicates that the major account in racial disparities in school discipline appears to be the higher referral of African American students for subjective offenses, such as "disrepect."[32]

Recent school crime and safety statistics from the National Center for Education Statistics (NCES) and the Bureau of Justice Statistics (BJS) indicate a "mixed picture of school safety" from the early to late 1990's.[33] For instance, between 1995 and 1999, the percentage of students who reported being victims of a crime at school declined from 10 to 8 percent. Unfortunately, however, the rates for some types of school crime , such as the percentage of students in grades 9 thru 12 who were either threatened or injured with a weapon on school grounds, or property has

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[31]Donald Stone, *Crime and Punishment in Public Schools: An Empirical Study of Disciplinary Proceedings* 17 American Journal of Trail Advocacy 351, 366 (1993). *Also,* for a considerably more detailed account of the legal issues surrounding racial discrimination in school discipline, see Patrick Pauken and Phillip T.K. Daniel's article, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis* 139 West's Education Law Reporter, 759-790 (2000)

[32]Russ Skiba, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, Bloomington: Indiana University, June 2000; *also,* Russ Skiba and Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools? Phi Delta Kappan* (January 1999).

[33]See *Indicators of School Crime and Safety* (October 2000), National Center for Education Statistics (NCES) and the Bureau of Justice Statistics (BJS).

remained constant from the years 1993 thru 1997 at approximately 7 or 8 percent. Since Congress' 1994 passage of the Federal Gun-Free Schools Act, 20 U.S.C. §8921, which required all U.S., states to pass legislation mandating a one-year school expulsion for any student found carrying firearms on school property, an increasing number of state legislatures and local school districts have enacted restrictive laws, commonly referred to as "zero tolerance" policies of not only firearms, but weapons, drugs, violence, and offensive speech.

In responding to the general public's demands for safer schools, significant numbers of school districts across the country have reinterpreted and surpassed the federal mandate provisions of the 1994 Federal Gun-Free Schools law, which calls for all states to order school districts to expel students for a minimum of one year if found in the possession of a firearm. Many school districts who report having zero tolerance policies in their schools indicate that these policies have been expanded to include not only truly dangerous behavior, but to control a wide array of student behaviors, some of which, pose no real threat to school safety.

As a result, suspensions and expulsions are increasingly becoming the "weapons of choice" used by school districts in varying degrees to create and maintain safer schools.[34] In the state of Illinois, for instance, Decatur zero tolerance case took place, the number of students expelled from the state's public schools rose significantly from 1,182 in the 1990-91 school to 2,744 student expulsions during the 1996-97 school year.[35]

While it is a laudable, even reasonable goal for policymakers, educators, and school administrators to develop policies and practices, such as zero tolerance, targeted toward creating and maintaining safe, violence-free schools, these same individuals need to be aware of two significant and related concerns of school disciplinary policies. First, how effective are the disciplinary policies at lowering school crime and violence in schools; second, allowing school districts greater discretionary powers toward interpreting, for example, zero-tolerance legal mandates, generally increases the potential for the unequal, or disparate administration of school

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[34]*See* Jessica Porter's article, *Districts Turn To Expulsions To Keep Order* Education Week on the Web, (April 19, 1995) <http://www.educationweek.org/ew/vol-14/30suspen.h14> .

[35]*See* Robert C. Johnson, Decatur Furor Sparks Wider Policy Debate (November 24, 1999) *Education Week on the Web* <http://www.educationweek.org/ew/ewstory.

disciplinary policies. Such potential for the uneven enforcement and dissemination of school discipline policies, especially through an inconsistent application of zero-tolerance policies to students at the school or district level, warrants concern over constitutional violations, largely pertaining to discrimination.

Recent 1996-97 data from the U.S. Department of Education's National Center for Education Statistics (NCES), Principal/School Disciplinarian Survey on School Violence, indicated that 94 percent of U.S. public schools surveyed reported having zero tolerance policies applied to the student offense of possession of a firearm; however, 91 percent of public schools who reported having zero tolerance policies applied them to students found in the possession of weapons other than firearms, 88 percent to student drug possession, 87 percent to student possession of alcohol, and 79 percent to tobacco and school violence issues, respectively (refer to Table 1). School violence statistics reported for the 1996-97 school year, indicate that physical attacks, or fights without a weapon led the list of reported crimes in U.S. public schools with approximately 190,000 such incidents reported.[36] Table 2, depicts that during the 1996-97 school year both the number and percentage of schools in which specified disciplinary actions were taken against students, total number of actions taken, and the percentage of specific disciplinary actions taken against students by the type of student infraction. As Table 2 shows, physical attacks or fights constitute the student infraction where the number and percentage of schools in which specified disciplinary actions were taken against students was the largest compared to other student infractions surveyed, including possession or use of a firearm, possession or use of a weapon other than a firearm, or the possession, distribution, or use of alcohol or drugs, including tobacco.

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[36]U.S. Department of Education, National Center for Education Statistics (NCES), *Violence and Discipline Problems in U.S. Public Schools: 1996-1997* (1998).

TABLE 1

Percentage of Public Schools that Reported A Zero Tolerance Policy For Specified Student Offenses, By Selected School Characteristics: 1996-97

School characteristics	Types of offenses					
	Violence	Firearms	Weapons Other than Firearms	Alcohol	Drugs	Tobacco
All public schools	79	94	91	87	88	79
Instructional level						
Elementary school	79	93	91	87	88	82
Middle school	75	95	90	86	90	77
High school	80	96	92	86	89	72
School enrollment						
Less than 300	76	93	89	84	84	76
300-999	79	94	91	88	89	82
1,000 or more	86	98	93	85	92	72
Locale						
City	87	97	95	89	91	83
Urban fringe	82	95	90	88	90	80
Town	71	90	86	82	83	77
Rural	76	94	92	88	89	78
Region						
Northeast	78	89	90	83	84	79
Southeast	83	95	89	90	92	80
Central	72	93	88	82	83	75
West	83	97	95	91	93	83
Percent minority enrollment						
Less than 5 percent	71	92	88	82	83	75
5-19 percent	79	94	92	89	90	80
20-49 percent	83	95	90	87	89	79
50 percent or more	85	97	94	90	92	83

TABLE 1

Percentage of Public Schools that Reported A Zero Tolerance Policy For Specified Student Offenses, By Selected School Characteristics: 1996-97

School characteristics	Types of offenses					
	Violence	Firearms	Weapons Other than Firearms	Alcohol	Drugs	Tobacco
Percent of students eligible for free or reduced-price school lunch						
Less than 20 percent	76	92	88	86	87	77
20-34 percent	77	94	90	87	88	82
35-49 percent	79	97	95	89	92	81
70-74 percent	80	95	90	85	88	79
75 percent or more	84	95	93	87	89	81

SOURCE: U.S. Department of Education, National Center for Education Statistics, Fast Response Survey System, "Principal/School Disciplinarian Survey on School Violence," FRSS 63, 1997

TABLE 2

Number and Percentage of Schools In Which Specified Disciplinary Actions Were Taken Against Students, Total Number of Actions Taken, and Percentage of Specific Disciplinary Actions Taken Against Students, By Type of Infraction: 1996-97

Infraction	Total Number of schools taking one or more of these specified actions	Percent of schools taking one or more of these specified actions	Total number of these specified actions taken	Expulsions (Number of actions taken)	Transfers to alternative schools or programs (Number of actions taken)	Out-of-school suspensions lasting 5 or more days (Number of actions taken)
Possession or use of a firearm	4,170	5	16,587	5,143	3,301	8,144
Possession or use of a weapon other than a firearm	16,740	22	58,554	13,698	12,943	31,970
Possession, distribution, or use of alcohol or drugs, including tobacco	20,960	27	170,464	30,522	34,255	105,723
Physical attacks or fights	30,160	39	330,696	50,961	62,108	217,627

SOURCE: U.S. Department of Education, National Center for Education Statistics, Fast Response Survey System, "Principal/School Disciplinarian Survey on School Violence," FRSS 63, 1997.

THE LAW OF STUDENT SUSPENSIONS AND EXPULSIONS: WHERE DO ZERO TOLERANCE POLICIES FIT (OR DO THEY)?

> While there has been a quantum leap from the posture espoused during the first third of the twentieth century to the active protection of students' rights characterized by the litigation of the late 1960s and early 1970s, judicial developments have not eroded educators' rights or their responsibilities. Reasonable disciplinary regulations, even those impairing students' protected liberties, have been upheld if justified by a legitimate educational interest. Educators not only have the authority but the duty to maintain discipline in schools.[37]

Today, states and school districts have the direct authority to monitor and control student behavior through the reasonable adoption and use of school disciplinary suspensions and expulsions.[38] Generally, reasonable disciplinary rules and regulations, even those that can be construed as encroaching upon students' constitutionally protected rights and liberties, have been upheld in court if the disciplinary actions are "...justified by a legitimate educational interest."[39] This heightened level of school district discretion relating to disciplinary suspensions and expulsions is justified largely on the school's responsibility to protect students while in school, as well as ensure that school environments are as conducive as possible to student learning. Indeed, the courts have historically "...exercised limited review of student disciplinary regulations, and pupils seldom were successful in challenging policies governing their behavior."[40] For instance, the 1906 New York decision *O'Connor v. Hendrick* ruled that the Courts will generally not interfere with a local school board's power to regulate its schools absent a clear abuse of

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[37]Martha M. McCarthy, Nelda H. Cambron-McCabe, and Stephen B. Thomas, *Public School Law: Teachers' and Students' Rights (Fourth Edition)* (Boston: Allyn and Bacon), p. 196.

[38]The U.S. Supreme Court has held that school boards have considerable flexibility in both establishing and interpreting a school's own disciplinary rules and regulations. *See:* Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966 (1982); Wood v. Strickland, 420 U.S. 308 (1975). Also, it is important to note that schools may enact reasonable discipline policies covering both school property and school-sponsored activities.

[39]McCarthy, Cambron-McCabe, and Thomas, *Public School Law: Teachers' and Students' Rights (Fourth Edition)* (Boston: Allyn and Bacon), p. 196.

[40]*Ibid*, p. 195.

discretion by school officials.[41]

Historically, public schools have exercised broad authority in disciplining students, largely unrestricted by due process requirements. Moreover, implicit in the common law is the principal of *in loco parentis*, or in the place of the parent, whereby teachers and principals have "...the authority and the duty to guide, correct, and punish the child in the accomplishment of educational objectives."[42] However, beginning in the 1960s, federal courts began to rule in favor of requiring some levels of due process accorded to students expelled from school.[43] By the late-1960s and early 1970s, most federal courts were applying, albeit to varying degrees, the due process clause to school expulsions. The Courts were unclear, however, as to whether or not a student's education was a property interest and how to apply due process to school suspensions of a short duration.

Despite the growing popularity of zero tolerance policies and their use in public schools across the country, students who are disciplined under zero tolerance policies do not "shed their constitutional rights...at the schoolhouse gate."[44] Instead, students have basic legal rights under the U.S. Constitution, as well as under a variety of federal and state level statutory laws. Thus, one of the deeply entrenched issues associated with implementing as well as enforcing student discipline policies is the inherent tensions between the school administrators' need to develop and maintain an orderly school environment, especially given the special status of students,[45] and the protection of students' rights At a minimum, students enrolled in public schools who are subject to either suspensions or expulsions are entitled to:

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[41]O'Conner v. Hendrick, 77 N.E. 612 (N.Y. 1906).

[42]Kern Alexander and M. David Alexander, *The Law of Schools, Students, and Teachers in a Nutshell,* St. Paul, Minnesota: West Group Publishers (1995).

[43]Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

[44]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

[45]*See, e.g., Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969), the landmark U.S. Supreme Court case that challenged the previous practice of the first third of the twentieth century *in loci parentis* (in the place of parents) and shifted both the law and school administrators to a more active protection of students' rights.

(1.) Constitutionally protected rights to due process under the Fourteenth Amendment.[46]

(2.) Constitutional and federal civil rights laws that prohibit inherently discriminatory policies based on race, class, or national origin.[47]

(3.) Students classified with special needs (i.e. students in special education classes) are additionally protected by federal statutes, such as Section 504 pf the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA).[48]

As applied to abuses of zero tolerance policies, school administrators, students, and their advocates need to be aware of these federal level protections as well as state constitutions and statutes that provide comparable or additional protections against zero tolerance policies.[49]

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[46]Specifically, the Equal Protection Clause of the Fourteenth Amendment provided in part that no state shall "...make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law," U.S. Constitution Amendment XIV, §1.

[47]Specifically, the Equal Protection Clause of the Fourteenth Amendment provides in part that no state shall "deny to any person within its jurisdiction the equal protection of the laws," U.S. Constitution Amendment XIV, §1. Also, the federal antidiscrimination statute Title VI of the Civil Rights Act of 1964, prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance (42 U.S.C. § 2000d.).

[48]Section 504 of the Rehabilitation Act of 1973 is a federal antidiscrimination law that prohibits discrimination based on disability and is applicable to public schools., 29 U.S.C. § 794. Recent studies have begun to indicate that zero tolerance policies disproportionately impact students with disabilities. For the purposes and scope of this essay, I am focusing on the issue of racial discrimination associated with zero tolerance abuses.

[49]Some states, for example, guarantee the fundamental right to education, a right not guaranteed under the federal Constitution.

THE LAW OF SHORT-TERM SUSPENSIONS: A BRIEF OVERVIEW[50]

Prior to the U.S. Supreme Court's 1975 *Goss v. Lopez*[51] decision, which provided legal guidance regarding the amount of due process involved in short-term suspensions (10 days or less), the predominantly held belief, as well as practice, was that decisions to suspend or expel students were made with the assumption that the attending of public schools was a privilege which could rightfully be taken away at the discretion of school authorities.[52] Equally important, the *Goss* decision established legally in the area of school discipline that a student's education is a property interest.[53]

The *Goss* decision grew out of a situation in the Columbus, Ohio, Public School System (CPSS), where nine African-American high school students were suspended for various types of misbehavior related to their involvement in student demonstrations at Marion-Franklin High School following Black History Month. Each of the students was suspended by the school principal and none of the students were provided a hearing prior to and after the suspensions. At the time of the suspensions, Ohio state law provided school principals the authority to suspend students for up to ten days without prior notice nor a hearing. The only procedure provided in state statutory law was that parents of suspended students needed to be notified of their child's suspension within 24 hours.[54] The *Goss* decision found that the Ohio statute violated the

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[50]Suspensions are defined as short-term disciplinary measures used to punish students for the violation of school rules and regulations when the infractions are deemed by school authorities to be not so severe as to warrant long-term denial of school attendance, such as school expulsions.

[51]Goss v. Lopez, 419 U.S. 565 (1975). The ruling in *Goss* held that the "...total exclusion from the educational process for more than a trivial period" is enough deprivation to qualify for due process protection under the Fourteenth Amendment of the U.S. Constitution.

[52]Kern Alexander and M. David Alexander, *American Public School Law (Fifth Edition)* Belmont, California: Wadsworth Group (2001).

[53]For a solid discussion of the *Goss* decision and its impact upon the legal aspects of student misconduct, see Lawrence F. Rossow and Jerry R. Parkinson's *The Law of Student Expulsions and Suspensions (Second Edition)* Dayton, Ohio: Education Law Association (1999).

[54]Ohio Rev. Code Ann. § 3313.66 (1972).

students' rights under the Fourteenth Amendment of the U.S. Constitution.[55] As a direct result of the *Goss* decision, students given suspensions, defined by the Court as being up to 10 days, must be accorded the following minimum protections of procedural due process. They include:

(1.) Oral or written notification of the specific violation(s) the student(s) is charged with and the intended punishment;

(2.) An opportunity to refute the charges before an objective decision maker;

(3.) An explanation of the evidence upon which the disciplinarian is relying.[56]

While the Court ruling in *Goss* has provided the rudimentary procedural due process requirements for short-term suspensions, the decision leaves many more questions relating to student suspensions and expulsions unanswered. For example, there is little legal guidance provided by the *Goss* decision pertaining to long-term suspensions and expulsions. In the *Goss* decision, the Courts did mention rather ambiguously that ..."longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[57] Additionally, there are limitations associated with the level of procedural due process given to suspended students. For instance, the mandatory hearing necessary for a student given a short-term suspension need not be a full adversarial hearing; an informal give-and-take between the student and the disciplinarian is suffice.[58] Moreover, student suspensions of ten days or less, do not require a right to counsel.[59]

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[55]419 U.S. at 571-72.

[56]McCarthy, Cambron-McCabe, and Thomas, p. 205.

[57]419 U.S. at 584.

[58]*Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, Cambridge: Massachusetts (2000), p. II-23

[59]In 1986 in *Bethel School District v. Fraser*, 478 U.S. 675, 686 (1986), the Court reaffirmed this by indicating that a two-day suspension "does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution.

THE LAW OF LONG-TERM SUSPENSIONS AND EXPULSIONS: A BRIEF OVERVIEW

There is considerably less legal unanimity , in regards to, or degree of general due process guidelines relating to suspensions and expulsions from school for a period exceeding ten days. Presently, there exists no U.S. Supreme Court precedent relating to long-term suspensions and expulsions. Generally, lower level courts have endorsed the notion that long-term suspensions should require more formal procedural due process requirements compared to short-term suspensions of ten day or less.[60] Consequently, most courts, as well as school authorities, view the *Dixon v. Alabama State Board of Education* for legal direction on the issue of the amount of due process given longer student suspensions and expulsions.[61] In *Dixon,* the Fifth Circuit held:

> [n]evertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of [the educational institution]. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the acts to which each witness testifies. He should also be given the opportunity to present...his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.[62]

In another case, *Matthews v. Eldridge,*[63] the Court provides a policy-oriented analysis of weighing three procedural due process issues against each other.[64] *Eldridge* states that the three

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[60]*See* Gonzales v. McEuen, 435 F.Supp. 460 (1977). In *Gonzales*, the United States District Court, Central District of California held that in order for a notice of a student expulsion hearing to be adequate, the notice must communicate the nature of the proceedings to the expelled student. Additionally, an expulsion notice must include a statement detailing both the specific charges and basic rights of the student(s), including the right to counsel, to present evidence, and to confront and cross-examine hostile witnesses. Prior to the *Gonzales,* for example, a student expulsion notice did not require notice that indicated the right to be represented by counsel.

[61]Dixon v. Alabama State Board of Education, 294 F.2d 105 (5th Cir. 1961).

[62]Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir. 1961).

[63]Matthews v. Eldridge, 424 U.S. 319 (1976).

[64]424 U.S. 319, 335 (1976). It is important to note that *Matthews v. Eldridge* is not a school discipline case per se, but provides courts guidance in balancing a student's interest in continuing his or her education while simultaneously acknowledging a school's interest in maintaining discipline and a safe school environment conducive to learning.

factors of procedural due process that must be weighed against each other are the following:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

While the *Goss* decision recommended that long-term suspensions may require more formal procedures of procedural due process, the Courts and school authorities are still uncertain of the "minimum" levels of due process necessary for longer term student suspensions and expulsions. Given the conflicting case law relating to issues of due process for student long-term-suspensions and expulsions, it is suggested that school districts develop "preestablished standardized disciplinary procedures to avoid the appearance of prejudice, minimize the potential for litigation, and most important, prevent unjust punishments.[65] Some of the more important unsettled issues of due process involving long-term student suspensions and expulsions include:

(1.) Whether or not a list of witnesses is required prior to the hearing;[66]

(2.) Whether or not the accused student(s) has the right to confront and question hostile witnesses;[67]

(3.) The admissibility of hearsay testimony;[68]

(4.) Whether or not there is a compromise in impartiality when the school board's own attorney present the case against the accused student;[69]

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[65]Michael Imber and Tyll Van Geel, *Education Law*, New York: McGraw Hill (1993), p. 237.

[66]Presently, most courts have held that a list of witnesses is *not* required. *See:* Keough v. Tate County Board of Education, 748 F.2d 1077 (5th Cir. 1984).

[67]Generally, the courts are largely split on this issue. Some courts permit the testimony of hostile witnesses in the form of anonymous affidavits; other courts, however, do not permit hostile witness testimony. *See:* Newsome v. Batavia Local School District, 842 F.2d 920 (6th Cir. 1988); Brewer by Dreyfus v. Austin Independent School District, 779 F.2d 260 (5th Cir. 1985).

[68]*See* Tasby v. Estes, 643 F.2d 1103 (5th Cir. Unit A Apr. 1981).

[69]The courts are split on this issue. *See* Gonzales v. McEuen, 435 F.Supp. 460 (C.D. Cal. 1977); Alex v. Allen, 409 F.Supp. 379 (W.D. Pa. 1976).

(5.) The right to legal counsel;[70]

(6.) Whether or not the accused student(s) have the right to a recording or transcript of their disciplinary hearing;[71]

(7.) The right to a written statement of reason(s) explaining the decision to suspend or expel.[72]

Given the varying and inconsistent court decisions at the appellate and circuit court levels, one recommendation for educators is the provision of considerable due process provisions in cases of long-term suspensions and expulsions. In their book, *The Law of Student Expulsions and Suspensions,* authors Lawrence F. Rossow and Jerry R. Parkinson provide school administrators with the following recommendations regarding notice provided students given long-term suspensions or expulsions. Given inherent uncertainties in the law of long-term suspensions and expulsions, Rossow and Parkinson suggest that a prudent course of action is for school authorities to provide extensive levels of due process when considering long-term suspensions or expulsions. The seven recommendations include:

(1.) an express intend to suspend or expel a student;

(2.) the specific charges against the student;

(3.) the specific rule(s) that were allegedly violated by the student(s);

(4.) the nature of the evidence supporting the charge(s) against the student(s);

(5.) The date, time, and place where the hearing regarding the suspension or expulsion will take place;

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[70]State and federal level courts are also divided on the issue of the right to an attorney at a student suspension or expulsion hearing. *See* Givens v. Poe, 346 F.Supp. 202 (W.D.N.C. 1972); Gonzales v. McEunen, 435 F.Supp. 460 (C.D. Cal. 1977).

[71]Most court decisions have *not* recognized the right to a recording or transcript of a disciplinary hearing. *See* Jaksa v. Regents of University of Michigan, 597 F.Supp. 1245 (E.D. Mich, 1984); *aff'd,* 787 F.2d 590 (6th Cir. 1986).

[72]In this area, too, most court decisions do not require nor recognize the right to the accused student(s) being given a written statement of reasons explaining the decision to suspend or expel. *See* Jaksa v. Regents of University of Michigan, 597 F.Supp. 1245 (E.D. Mich. 1984);*aff'd,* 787 F.2d 590 (6th Cir. 1986).

(6.) A copy of the procedures that will be followed at the hearing;

(7.) A remainder of the rights that the students and parent(s) have, include the right to counsel, presentation of witnesses, cross-examination of hostile witnesses, and a copy of the hearing transcript.

Thus, whether the issue concerns short-term student suspensions covered under the *Goss* decision or long-term student suspensions or expulsions, the multiplicity of issues surrounding the provision of due process of law is critical. As this essay will further elaborate, the Due Process Clause of the Fourteenth Amendment has the potential to provide "real but limited protections to students living under zero tolerance policies."[73] The next section of this essay will explore some of the legal protections possible under the constitutional rights of due process when zero tolerance policies are challenged as both excessive and unfair. First, however, the concept of due process and its legal elements must be defined and placed specifically within the contest of school disciplinary policies.

STUDENT RIGHTS TO DUE PROCESS IN SCHOOL DISCIPLINE: ARE WE NEGLECTING THE IMPORTANCE OF SUBSTANTIVE DUE PROCESS?

> Defining due process of law can be extremely difficult. The Supreme Court commented several decades ago: "Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts...whether the Constitution requires that a particular right contained in a specific proceeding depends upon a complexity of factors.[74]

The Due Process Clause of the Fourteenth Amendment constitutes the legal and historical foundations of the law of student suspensions and expulsions in U.S. public schools. The 2001 Deskbook Encyclopedia of American School Law defines due process as:

> ...accorded an individual when the governmental body undertaking the proceedings against that individual adequately informs the accused of the charges, gives the accused enough notice to prepare a proper defense, allows the accused the opportunity to confront witnessess and challange the testimony given,

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[73]Ibid, II-21.

[74]Lawrence R. Rossow, *Administrative Discretion and Student Suspensions: A Lion In Waiting*, 13 Journal of Law and Education, pp. 418-19 (1984).

and permits the presentation of evidence on his or her own behalf.[75]

There are two types of due process under U.S. common law: (1.) procedural due process[76] and (2.) substantive due process.[77] Procedural due process requires that states provide adequate and fair procedures when determining when and if a person(s) can be deprived of life, liberty, or property.[78] In order to raise a procedural due process claim, a plaintiff must: (1.) identify a protected property, or liberty interest; (2.) demonstrate that they were deprived of that interest by state action; and (3.) establish that the deprivation occurred without due process.

The second component of due process, substantive due process, has been defined as:

> The phrase 'due process of law,' when applied to substantive rights, means that the state is without power to deprive a person of life, liberty or property by an act having no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. Substantive due process may be implicated by the rules and regulations written by educators to regulate or control student behavior, such as the student handbook with rights and responsibilities.[79]

A major legal principal regarding substantive due process issues is the elusive concept of "fundamental fairness." Two general issues addressed by "fundamental fairness" under substantive due process are:

(1.) Does the punishment fit the crime?

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[75]Steve McEllistream, Patricia Grzywacz, and James A. Roth (Eds.), 2001 *Deskbook Encyclopedia of American School Law*, Burnsville, Minnesota: Oakstone Legal and Business Publishing Co., (2001).

[76]In the specific context of school discipline, procedural due process is the fundamental right to have adequate notice of charges against you and ample opportunity to refute these charges before a fair tribunal if life, liberty, or property interests are at stake.

[77]Substantive due process refers specifically to the constitutional safeguards specified in both the Fifth and Fourteenth Amendments that school discipline policies, such as zero-tolerance , be fair and reasonable in content and application. Specifically, substantive due process protects against "arbitrary, capricious, or unreasonable governmental action."

[78]For a good discussion of due process and its impact on U.S. public schools, see Kern Alexander and M. David Alexander's, *The Law of Schools, Students and Teachers In A Nutshell* (St. Paul, Minnesota: West Group Publishing (1995).

[79]Ibid, p. 66.

(2.) Was "fair warning" given to students so that they are aware that their behavior might result in either a school suspension or expulsion?[80]

A major issue in substantive due process analysis is whether or not the rules or policies in question provide adequate notice of what conduct(s) is specifically prohibited.. In a leading federal court decision, *Dixon v. Alabama State Board of Education*, the court held that college attendance was so essential that college and university administrators could not take this "substantive" right away without a hearing and due process requirements.[81] Additionally, substantive due process considerations include whether or not the disciplinary policy are "grossly disproportionate to the offense."[82] Also, some school disciplinary policies have been challenged, largely unsuccessfully, on the substantive due process grounds of "vagueness" or "overbroad."[83] In *Alex v. Allen*, for instance, the court rejected a student's claim, who was facing a thirty-day suspension, that the disciplinary rules he was accused of violating were both vague and overbroad..[84] Since courts allow school authorities considerable discretion in disciplining students for a wide range of student activities, school disciplinary rules and regulations do not need to be as detailed as criminal codes.[85]

The courts continue to interpret violations of substantive due process very narrowly. Currently, for example, only the rights of privacy and autonomy are considered fundamental rights. In practice, the review and revocation of long-term suspensions or expulsions on

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[80]Lawrence F. Rossow and Jerry R. Parkinson, *The Law of Student Expulsions and Suspensions (Second Edition)* Dayton, Ohio: Education Law Association (1999).

[81]Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961).

[82]*See* James v. Unified School District, 899 F.Supp. 530 (D.Kan. 1995); Petrey v. Flaugher, 505 F.Supp. 1087 (E.D. Ky. 1981).

[83]Vague school disciplinary rules can be challenged to be in violation of the due process clause on substantive grounds because they potentially fail to provide adequate notice as to what is and what is not permissible student conduct. Overbroad disciplinary rules can be challenged on substantive due process grounds that the rules do more than is necessary to achieve certain end results and as a result violate students' constitutionally protected rights of due process.

[84]Alex v. Allen, 409 F.Supp. 379 (1976).

[85]*See* Bethel School District v. Fraser, 478 U.S. 675, 686 (1983).

substantive due process grounds has occurred only rarely when the Court determined that there existed no "rational relationship between the punishment and the offense."[86] In order to determine whether there exists a "rational relationship between the punishment and the offense," the Courts have usually relied on addressing the issue of whether or not the suspension or expulsion (i.e. punishment) was "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conductive to learning."[87] In related cases, court decisions have used the "arbitrary, capricious, or wholly unrelated" test with similar language, including whether the student suspensions or expulsions were "grossly disproportionate to the offense,"[88] was there a "shocking disparity between the expulsion and the offense,"[89] or was the action "willful and unreasoning without consideration and in disregard of the facts or circumstances of the case."[90]

As a result, courts have been extremely reluctant to overturn school disciplinary decisions, particularly long-term suspensions and expulsions on substantive due process grounds. The *Goss v. Lopez* has provided limited clarity concerning the amount of procedural due process required for short-term suspensions. In the area of long-term student suspensions and expulsions, however, the Courts continue to be unclear. Additionally, we have seen in the area of applying due process to student discipline cases, the Courts have repeatedly shown more deference to procedural due process concerns; whereas, the legal threshold for establishing substantive due process violations in school discipline cases has been set.[91]

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[86]*See* Brewer v. Austin Independent School District, 779 F.2d 260, 264 (5th Cir. 1985).

[87]Woodward v. Los Fresnos Independent School District, 732 F.2d 1243, 1246 (5th Cir. 1984).

[88]James v. Unified School District, 899 F.Supp. 530, 534 (D.Kan. 1995); Petry v. Flaugher, 505 F.Supp. 1087, 1090-91 (E.D. Ky. 1981).

[89]Lokesnick v. Omaha Public School District, 558 N.W.2d 807, 813-14 (Neb. 1997).

[90]Greenhill v. Bailey, 519 F.2d 5, 10 n. 12(8th Cir. 1975).

[91]Some examples of cases representative of the Courts' high threshold for establishing substantive due process violations include: Enterprise City Board of Education v. C.P., 698 So.2d 131 (Ala.Civ.App. 1996), where an Alabama court upheld an eight-week suspension of a high school student who drove to school in a family car containing a gun left in it by the mother-a fact unknown by the

SCHOOL DISCIPLINE AND THE POTENTIAL FOR RACIAL DISCRIMINATION: LEGAL PROTECTIONS UNDER THE EQUAL PROTECTION CLAUSE AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

> Racial discrimination in school discipline is a deep-seated problem. Long before zero tolerance policies became popular, students of color were subjected to suspension and expulsion in disproportionate numbers and typically received harsher punishment than their white counterparts. As one advocate has noted, it is no coincidence that the U.S. Supreme Court's leading case on school discipline and students' due process rights, *Goss v. Lopez*, "involved the sweeping, indiscriminate suspension of black students from Columbus, Ohio public schools for allegedly taking part in demonstrations following Black History Month.[92]

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination by the state and local governments on the basis of race, color, or national origin.[93] In examining whether a state law, policy, or activity violates the Equal Protection Clause on the basis of race, color, or national origin, the courts use a rigorous legal standard of "strict scrutiny" analysis. Under "strict scrutiny" analysis, the law, policy, or action must be narrowly tailored to meet a compelling governmental interest. For example, if a school policy that suspended white students for one type of violent act, such as fighting as in the *Fuller v. Decatur Public School Board of Education School District*, but expelled African American students for the same offense, this particular school policy could be viewed as unconstitutional, even if it might be justified by an important governmental interest, such as maintaining school safety. Authors Patrick Pauken and Philip T.K. Daniel state,

> In order for a government actor, including an official of a public school district, to treat people differently on the basis of race or ethnicity, he or she must show that the rule or action was necessary and narrowly-tailored to achieve a compelling governmental interest. Explicit classifications based on race and national origin in

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student; Also: Petrey v. Flaugher, 505 F.Supp. 1087, 1091-92 (E.D. Ky. 1981), where a federal court in Kentucky ruled that the expulsion of a student for the majority of the academic year for the offense of smoking marijuana on school property was not "grossly disproportionate."

[92]The Civil Rights Project at Harvard University and the Advancement Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* (June 2000).

[93]The Fourteenth Amendment, in part, states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution Amendment XIV, § 1.

> schools are no longer common; schools will rarely succeed with, and will even more rarely promote such a defense.[94]

Unfortunately, there exists considerable evidence that racial minorities are disciplined more severely than white students.[95] In June 2000, the Civil Rights Project (CRP) at Harvard University in partnership with the Advancement Project (AP), published the first national report titled, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* analyzing the impact of zero tolerance policies upon America's public school system. The findings of this report unequivocally report that zero tolerance polices are unfair, in opposition to the developmental needs of school children, a violation of equal educational opportunity, particularly minority children, and often result in the criminalization of children.

Equal Protection Clause claims challenging excessive usage of zero tolerance policies in schools, particularly showing racial disparities in the distribution of suspensions and expulsions, can be as difficult to establish as substantive due process claims. The main reason for this difficulty in establishing an Equal Protection Clause violation is the requirement that plaintiffs prove "discriminatory intent."[96] Patrick Pauken and Philip T.K. Daniel distinguish the legal standards of "disparate treatment (intent)" and "disparate impact" as the following:

> Disparate treatment requires intent on the part of the defendant. In fact, some courts have held that evidence of disparate impact, while a start, is not sufficient to state a claim for race or national origin discrimination in student discipline. There must be a demonstration of discriminatory intent, purpose, or motive. Disparate impact is shown if the plaintiff presents evidence that a facially neutral policy has a discordant influence on a protected class of students (often presented by statistical analyses).[97]

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[94]Patrick Pauken and Philip T.K. Daniel, Race Discrimination and Disability Discrimination In School Discipline: A Legal and Statistical Analysis. *West's Education Law Reporter*, (2000), p. 763.

[95]1993-94 data from the U.S. Department of Education's Office for Civil Rights (OCR) indicated that African American student received approximately 33 percent of all out-of-school suspensions for more than 10 days, even though they constituted 17 percent of the U.S. public school population in 1993-94. White students received 50 percent of school suspensions, while constituting approximately 68 percent of U.S. public school enrollment.

[97] Paulken and Daniel, p. 763.

Since the U.S. Supreme Court's 1976 *Washington v. Davis* decision, plaintiffs need to provide significant evidence that governmental bodies, such as a public school, "intended" to discriminate on the basis of race in developing and administering a school discipline policy. Generally, statistical evidence of racial disparities alone, is not sufficient to establish an Equal Protection Clause Violation.[98]

DISPARATE TREATMENT AND ADVERSE IMPACT THEORIES: LEGAL PROTECTIONS FROM TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

> Some courts have found the disciplinary rules and/or actions of school districts unlawful on the basis of such disparate impact. Others hold that disparate impact is not enough to support a claim of discrimination in discipline; instead, they assert that the plaintiffs must show intentional or purposeful discrimination. Discriminatory intent or motive, however, may be inferred from statistical or other evidence demonstrating that students of color are disciplined more severely than white students for similar conduct.[99]

In addition to legal protections under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, prohibits discrimination on the basis of race, color, or national origin by schools that receive federal financial assistance.[100] In contrast to the Equal Protection Clause of the Fourteenth Amendment, two possible legal protections are available under Title VI that could be used to address zero tolerance abuses. They include:

(1.) disparate (or different) treatment claims[101]

(2.) adverse impact claims[102]

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[98]Washington v. Davis, 426 U.S. 229 (1976).

[99]Patrick Pauken and Philip T.K. Daniel, Race Discrimination and Disability Discrimination In School Discipline: A Legal and Statistical Analysis. *West's Education Law Reporter*, (2000), pp. 759-60.

[100]Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

[101]Under Title VI, disparate treatment claim requires both proof of both differential treatment based on race as well as discriminatory intent.

[102]Under Title VI, adverse impact claims do not have to prove discriminatory intent, but rather need to prove disparate impact, which has been shown statistically as evidence depicting racial disparities in the administration of zero tolerance policies.

Authors Pauken and Daniel state:

> Disparate impact is shown if the plaintiff presents evidence that a facially neutral policy has a discordant influence on a protected class of students (often presented by statistical analyses). If such an impact emerges, the defendant school district must demonstrate that its decisions were based on some sort of non-discriminatory "business necessity" such as the maintenance of order and secúrity.[103]

Disparate treatment, on the other hand, requires intent on the part of the defendant. In many cases, courts have viewed disparate impact as a necessary but not sufficient condition for developing a legal claim for racial discrimination in the area of abusive school disciplinary practices, such as zero tolerance. In many instances, in order for a successful challenge of racial discrimination in a school's discipline policies, there needs to be a "demonstration of discriminatory intent, purpose, or motive."[104]

In some court school disciplinary cases, the presence of disparate impact through statistical analyses, such as racial disparities which show that the suspension and expulsion rate for students of color is considerably higher than one would expect from a random sample, or distribution of students.[105] More recently, the presentation of "statistically significant disparities in the suspension of students across the country has not been sufficient, by itself, to show unlawful race discrimination."[106] For example, in *Parker v. Trinity High School*, the court ruled that the plaintiffs in the case needed to show discriminatory intent; discriminatory or disparate

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[103]Pauken and Daniel, p. 763.

[104]Pauken and Daniel, p. 764.

[105]In Pauken and Daniel's article, they highlight the *Hawkins v. Coleman*, 376 F.Supp. 1330 (N.D.Tex. 1974 decision. In the *Hawkins* decision, the expert witness testimony of Dr. Scott Kestler was instrumental is demonstrating to the courts that the statistically significant disparities in the suspension between African American and white students in the Dallas Independent School District (DISD) was sufficient, by itself, to show racial discrimination in the school district's disciplinary policies. In other words, disparate impact, not intent, was suffice in this case.

[106]Pauken and Daniel, p. 768.

impact is not alone sufficient.[107]

In contrast to disparate treatment claims, the courts can apply a three-step test to determine whether or not a school disciplinary policy is discriminatory under an adverse impact claim(s). The three-step test to determine whether or not there an adverse impact includes:

> (1.) Does the practice or procedure have a disproportionate impact based on race, color, or national origin?
>
> (2.) Is the practice or procedure an educational necessity?
>
> (3.) Is there an alternative practice or procedure that would be feasible and achieve the same purpose, with less discriminatory purpose?[108]

In most cases, statistical analyses can be extremely useful in demonstrating race-based student disciplinary disparities who are disciplined under zero tolerance policies. However, in many recent cases, including the *Fuller v. Decatur Public School Board of Education School District* case under scrutiny in this essay, the use of statistical analyses to prove discriminatory intent, purpose, or motive."[109]

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[107]Parker v. Trinity High School, 823 F.Supp. 511 (N.D. Ill. 1993). In this case, two sisters were in a fight with another student (mainly over hairstyle and the color of the other student). The fight was a serious one and many teachers were hurt trying to break up the fight. All three students were expelled. The plaintiffs' (two sisters) argued that fighting under the school code did not call for dismissal and that white students had previously engaged in this type of student misconduct without being expelled.

[108]Civil Rights Project at Harvard University and the Advancement Project's report, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* (June 2000), p. II-7.

[109]*See* Tasby v. Estes, 643 F.2d 1103 (5th Cir. 1981).

ZERO TOLERANCE POLICIES AND NON-WEAPON SCHOOL VIOLENCE INFRACTIONS: *FULLER V. DECATUR PUBLIC SCHOOL BOARD OF EDUCATION SCHOOL DISTRICT*

> It concerns me that there is a disproportionate number of African American being disciplined. But our student behavior code is colorless. We do not separate rules for minority and majority students. We also don't have special rules for star athletes. We have one rule for all students (Kenneth Arndt, Superintendent, Decatur Public School District).[110]
>
> The Zero Tolerance Policy of the Decatur (IL) Schools is an ugly, expensive, uneducational failure. It is the biggest civil rights issue facing the country (Jesse Jackson, Statement presented before the U.S. Commission on Civil Rights, February 18, 2000).
>
> ...the discipline (expulsion of the Decatur high school students) was tougher than anything the judicial system would have melted out (Macon County Sheriff, Roger Walker).

One of the more recent, divisive, and widely publicized controversies involving the use of zero tolerance policies in America's schools occurred in the unlikely Midwestern, working-class town of Decatur, Illinois, a relatively small city of approximately 83,000, three hours southwest of Chicago. Public school discipline data for the state of Illinois indicate that the number of students expelled rose significantly from 1,182 in the 1990-91 school to 2,744 student expulsions during the 1996-97 school year.[111] The national media spotlight descended upon the Decatur Public School Board of Education shortly after Rev. Jesse L. Jackson and his Rainbow/PUSH Coalition's involvement in the defense of seven African American high school students given a two-year expulsion under the Decatur Public School District's zero-tolerance policy over a fight at a high school football game.

The Rev. Jesse L. Jackson's involvement in the Decatur incident was used to bring

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[110]Dorothy Puch, Decatur Ruling Relief for Other School Districts (January 16, 2000). *The News-Gazette OnLine* <http://www.news-gazette.com>.

[111]Robert C. Johnson, Decatur Furor Sparks Wider Policy Debate (November 24, 1999) *Education Week on the Web* <http://www.educationweek.org/ew/ewstory.>.

negative attention to schools' "zero-tolerance" policies toward violence. As a result of the media attention over the fighting melee in Decatur, Illinois State Schools Superintendent, Glenn W. McGee, has called for statewide public forums on student expulsions and suspensions.

The following facts of the case are those that were based on the testimony the court heard at trial during the *Fuller v. Decatur Public School Board of Education School District.*[112] On Friday, September 17, 1999, a high school football game was played between Eisenhower and MacArthur High Schools. Approximately six minutes into the third quarter, witnesses at the game noticed a fight break out in the bleachers on the east end of the football field.[113] Due to the "bench-clearing" nature of the melee, witnesses indicated that spectators in the east bleachers section scrambled to get away, including "jumping over the rail, coming down trying to get onto the track" and "running up the bleachers trying to get away."[114]

While the fight lasted only approximately ten minutes, Ed Boehm, principal at MacArthur High School, testified that "..he had never seen a fight of this magnitude in his 27 years in education."[115] At the fight's conclusion, witnesses testified that the bleachers at the game were half-empty and many of the spectators in the east bleachers expressed "fear, stress, and turmoil."[116] After the fight, seven spectators reported that they received injuries as a result of the fight.[117]

In addition to eyewitness testimony in the case, a videotape taken by a spectator seated in

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[112]*Fuller v. Decatur Public School Board of Education School District* 78 F.Supp.2d 812 (C.D.Ill. 2000).

[113]*Id.* at 816.

[114]*Id.* at 816.

[115]*Id.* at 816.

[116]*Id.* at 816.

[117]Fortunately, nobody was seriously injured as a result of the fight. However, accident reports were made part of the legal record. The accident reports indicated that seven bystanders, six MacArthur High School Students and one adult sustained minor injuries, mainly bruises, due to the fight. For example, a 15-year-old MacArthur High School student testified that he suffered a contusion to his face when he was punched in his left cheek..

the west end of the bleachers was admitted into evidence by the district court. The videotape covered approximately the "final one-third" of the fight. The contents of the video capturing the fight corroborated the testimonies of the witnesses. Specifically, the videotape:

> ...showed a violent fight where the participants were punching and kicking at each other, with no regard for the safety of individuals seated in the stands watching the game. The videotape also showed that spectators in the bleachers were scrambling to get away from the fight.[118]

The following Monday, September 20, 1999, an investigation was initiated by the school administration at each of the three high schools where seven students were identified as instigating and participating in Friday's flight at the Eisenhower-MacArthur High School football game. These three schools, all located within the Decatur Public School Board of Education School District, were Stephen Decatur High School, Eisenhower High School, and MacArthur High School.[119] During this investigation, evidence was introduced that demonstrated that each of the seven students was involved in the fight.[120] At this stage, all the students identified in the fight was suspended from school for ten days pending future Decatur School Board action.[121] Each principal of the three high schools where at least one of the suspected students' attended; Ed Boehm, principal at MacArthur, Walter Scott, principal at Eisenhower High School, and Jim Thomas, principal of Stephen Decatur High School, recommended a two-year expulsion of each of the students involved in the fighting incident. Principal Thomas of Decatur High School, for example, stated, "...[the] severe nature of the infration warrants the recommendation for

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[118]*Id.* at 816.

[119]Technically, seven students, all African American males, were identified by witnesses and a spectator's videotape as involved in starting the football game brawl. However, one student withdrew from school before school administrators had the opportunity to expel him. As a result, six students (as minors) comprised the plaintiffs in the legal suit against the Decatur Public School Board of Education School District.

[120]During trail, the high school students did not deny their involvement in the brawl; instead, the students', or plaintiffs' major contention was the belief that the two-year suspension was unusually harsh and discriminatory. Later, the two-year expulsion was reduced to a one-year suspension as a result of Rev. Jesse L. Jackson's negotiations with Illinois Governor, George Ryan and Decatur Public School District Superintendent, Kenneth Arndt

[121]*Fuller v. Decatur Public School Board School District 61*, 78 F.Supp.2d at 817. Also,

expulsion."[122] Several days later on September 23, 1999, Superintendent for the Decatur Public School District, Kenneth Arndt, distributed a letter to the parents or guardians of each of the six high school students. In accordance with the law of student suspensions and expulsions, the letter stated that a school disciplinary hearing had been set before a school hearing officer. In addition, a date, time, and location was provided in the letter and that the parent or guardian and the student "are herewith requested to appear" at the scheduled meeting and "[y}ou are not required to attend, however, if you desire you may attend and also have an attorney and witnesses present."[123]

Superintendent Arndt's letter also contained the provisions of the Decatur School District's Student Discipline Policy and Procedures that each student was charged with violating. Specifically, the students were charged with the following student infractions of the Decatur School District's Student Discipline Policy and Procedures; they included:

> **Rule 10:** Gang-Like Activities
>
> **Rule 13:** Physical Confrontation/Physical Violence with Staff or Students
>
> **Rule 28:** Any Other Acts That Engender the Well-Being of Students, Teachers, or Any School Employee(s)

At major issue in *Fuller* was the fact of whether or not the Decatur School Board's "no tolerance/zero tolerance policy for violence" violated the students' procedural and substantive due process rights.[124]

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[122] *Id.*, at 817.

[123] *Id.* at 817.

[124] *Id.* at 825 (C.D. Ill. 2000).

FULLER V. DECATUR PUBLIC SCHOOL BOARD: THE RULING AND SOME IMPLICATIONS FOR ZERO TOLERANCE POLICIES

On January 11, 2000, U.S. District Judge Michael McCuskey upheld the Decatur School Board's original zero-tolerance punishment of two years' expulsion of the six African-American high school students without alternative school placement. Shortly after the ruling, the Decatur School Board reduced the school expulsions to one-year with the possibility of the six accused students of attending county-run alternative school programs. This reduction in suspension occurred after Rev. Jesse Jackson had a meeting with Illinois Governor George Ryan.

A closer look at the *Fuller* ruling demonstrates some shortcomings associated with excessive discretionary school disciplinary rules, such as the zero tolerance two-year expulsions of the six Decatur high school students for fighting. District Judge McCuskey did not agree with the Rainbow/PUSH and the students' position that since no weapons were used during the fight it was not a "significant fight."[125] More specifically, Judge McCuskey ruled against the Decatur students' and upheld the two-year expulsion without alternative schools on four specific grounds. These four issues include:

> (1.) In relation to the students' claim that their First Amendment rights to due process were violated, the court ruled that each student "received notice of a hearing before an independent hearing officer and before the [Decatur] School Board."[126] As a result, the court concludes that the students' procedural due process rights were not violated.[127]
>
> (2.) The court ruled that the students' did not present significant evidence that the Decatur School Board's two-year student expulsion decision was based upon race and thus a violation of both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[128] Dr. Walter Amprey,

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[125]78 F.Supp. 2d 812 at 815 (C.D. Ill. 2000).

[126]78 F.Supp. 2d 812 at 815 (C.D. Ill. 2000).

[127]It is important to point out that in *Fuller*, the court's discussion of due process concentrated solely upon satisfying minimum requirements for procedural due process; no treatment was given to substantive due process. As I indicate in the conclusion of this essay, one of the problems associated with zero tolerance litigation is the scant treatment given substantive due process claims.

[128]78 F.Supp. 2d 812 at 815 (C.D. Ill. 2000).

former superintendent of the Baltimore, Maryland public schools, represented the students' claim that African American students were disproportionately suspended and expelled compared to white students in the Decatur Public School District. Judge McCuskey held that "statistics and anecdotal evidence alone do not prove racial discrimination."[129]

(3.) Judge McCuskey ruled the students' failed to establish the claim that the Decatur School Board had a "zero tolerance policy." Instead, the evidence indicated that on August 28, 1998, the Decatur School Board passed a resolution that held a "zero tolerance position on school violence."[130]

(4.) The students cannot challenge the school regulation prohibiting "gang-like activity" as void for vagueness. It was clear that the students violated Rule 13: Physical Confrontation/Physical Violence with Staff or Students and Rule 28: Any Other Acts That Endanger the Well-Being of Students, Teachers, or Any School Employee(s). The court ruled that the violation of these two rules alone, would form sufficient basis for the Decatur School Board's expulsion of these students.[131]

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[129]Alan Richard, U.S. Judge Upholds Expulsions in Decatur (January 19, 2000) *Education Week on the Web* <http://www.educationweek.org/ew/ewstory>.

[130]78 F.Supp. 2d 812 at 815 (C.D. Ill. 2000).

[131]78 F.Supp. 2d 812 at 816 (C.D. Ill. 2000).

CONCLUSIONS

> If a discipline code does not contravene relevant state law or prescribe grossly disproportionate punishments, there is no further check on the severity of the punishment and no due process requirement that mitigating factors be taken into account. Courts agree that "a harsh result does not suggest that due process was lacking or that the procedures followed to teach that result were unlawful,"[132] even when the court disagrees with the severity of the punishment imposed.[133]

This essay argues that educators, attorneys, and general advocates of children, should be concerned with the potential "(in)tolerance" of zero tolerance policies, disguised and legitimated as disciplinary punishments in the nation's public schools. An examination of last year's *Fuller v. Decatur Public School Board of Education School District 61* decision is reflective of a disciplinary punishment (2 year suspension without the opportunity to attend alternative schools) that is "grossly disproportionate to the offense[134]" and "arbitrary, capricious, or wholly unrelated to the legitimate goal of maintaining an atmosphere conducive to learning,"[135] Very few, including the author of this essay, would argue that the high school students involved in the Decatur fighting incident did not deserve punishment for the melee they initiated. Moreover, a case by the Decatur School Board recommending a long-term suspension or expulsion (over 10 days) of the six students could reasonably be made. However, the Decatur School Board's two-year suspension with no alternative schooling is not only excessive, but educationally troubling.

In summary, this essay argues that educators and the courts need to be more proactive in the following areas to prevent zero tolerance school disciplinary abuses. They include:

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[132]Doe v. Board of Education of Oak Park and River Forest High School District, 94 C 6449, 1995 U.S. Dist. LEXIS 15086 at 14 (N.D. Ill. Oct. 11, 1995).

[133]The Civil Rights Project at Harvard University and the Advancement Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, June 2000, p. II-31.

[134]*See* James v. Unified School District, 899 F.Supp. 530, 534 (D.Kan. 1995); Also, Petrey v. Flaugher, 505 F.Supp. 1087, 1090-91 (E.D. Ky. 1981).

[135]*See* Washington v. Smith, 618 N.E.2d 561 (ill. App. Ct 1993). In this Illinois case, the court ruled that a semester school expulsion for a student found in the possession of an ice pick in school was unwarranted given the evidence that showed that the student did not threaten anyone in any way.

- Courts need to be more receptive to potential "substantive due process" violations, especially when it relates to the application of zero tolerance policies that are "grossly disproportionate to the offense"[136] or "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."

- Courts need to increase the admissibility of reliable and valid statistical analyses in school discipline cases, including zero tolerance policies, when legally determining whether racially discriminatory school discipline policies exist. In appropriate cases, the courts' increased reliance on adverse impact claims of racial discrimination in school discipline related cases would be a definitive step in the right direction.

- School districts, policymakers, and researchers must have in place more uniform and reliable school discipline data collection and dissemination procedures. School discipline data varies widely at the state and local levels.

While the aforementioned three recommendations are far from comprehensive in dealing with the full complexities of whether or not zero tolerance policies are viable methods of dealing with school violence in the 21st century, they should be areas of real concern for the educational and legal community. By addressing these particular issues, the schools, courts, and advocates will be simultaneously minimizing zero tolerance disciplinary abuses while preserving the delicate balance between maintaining school safety and satisfying students' rights.

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[136]James v, Unified School District, 899 F.Supp. 530, 534 (D.Kan. 1995); Petrey v. Flaugher, 505 F.Supp. 1087, 1090-91 (E.D. Ky. 1981).

APPENDIX A

THE 1994 FEDERAL GUN-FREE SCHOOLS ACT OF 1994

''PART F--GUN POSSESSION

''SEC. 14601. GUN-FREE REQUIREMENTS.

''(a) Short Title.--This section may be cited as the 'Gun-Free Schools Act of 1994'.
''(b) Requirements.--

''(1) In general.--Except as provided in paragraph (3), each State receiving Federal funds under this Act shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis.

''(2) Construction.--Nothing in this title shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student's regular school setting from providing educational services to such student in an alternative setting.

''(3) Special rule.--

''(A) Any State that has a law in effect prior to the date of enactment of the Improving America's Schools Act of 1994 which is in conflict with the not less than one year expulsion requirement described in paragraph (1) shall have the period of time described in subparagraph (B) to comply with such requirement.

''(B) The period of time shall be the period beginning on the date of enactment of the Improving America's Schools Act and ending one year after such date.

''(4) Definition.--For the purpose of this section, the term 'weapon' means a firearm as such term is defined in section 921 of title 18, United States Code.

''(c) Special Rule.--The provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act.

''(d) Report to State.--Each local educational agency requesting assistance from the State educational agency that is to be provided from funds made available to the State under this Act shall provide to the State, in the application requesting such Dassistance--

''(1) an assurance that such local educational agency is in compliance with the State law required by subsection (b); and

''(2) a description of the circumstances surrounding any expulsions imposed under the State law required by subsection (b), including--

''(A) the name of the school concerned;

''(B) the number of students expelled from such school; and

''(C) the type of weapons concerned.

''(e) Reporting.--Each State shall report the information described in subsection (c) to the Secretary on an annual basis.

''(f) Report to Congress.--Two years after the date of enactment of the Improving America's Schools Act of 1994, the Secretary shall report to Congress if any State is not in compliance with the requirements of this title.

-###-

SEC. 14514. REQUIRED PARTICIPATION PROHIBITED. PREV UP NEXT SEC. 14602. POLICY REGARDING CRIMINAL JUSTICE SYSTEM REFERRAL.

PUBLIC SCHOOL DISCIPLINARY MEASURES REQUIRED UNDER STATE LAW

State	Reasons for Suspension	Reasons for expulsion	Availability of alternative education programs Mandatory = M Voluntary = V
Alabama	Possession of drugs, alcohol, weapons, physical harm to a person, or threat of physical harm.	Possession of a firearm.	M
Alaska	Willful disobedience; open and persistent defiance of authority; conviction of a felony.	Possession of firearm or deadly weapon.	
Arizona		Continued open defiance of authority; continued disruptive or disorderly behavior; use or display of a dangerous instrument or deadly weapon; use or possession of a gun; excessive absenteeism.	V
Arkansas	Assault or threat; using , offering or selling alcoholic beverages or other illicit drugs; possession of paging device; willful or intentional damage or destruction or stealing of school property.	Hazing; possession of firearm or other weapons; illegal drugs or other contraband.	M
California	Possession, selling firearm; recommended expulsion; terrorist threats; hate violence; threat to cause physical harm; property damage; extortion; habitual profanity.	Possession or selling of firearm; assault with a deadly weapon; terrorist threats; hate violence; threat to cause physical harm; property damage; extortion; habitual profanity.	V
Colorado	Continued willful disobedience	Continued willful disobedience	M

APPENDIX B

SCHOOL DISCIPLINARY MEASURES REQUIRED UNDER STATE LAW

	of proper authority; willful destruction or defacing of school property.	of proper authority; willful destruction or defacing of school property; carrying, bringing, using or possessing a dangerous weapon; sale of a drug or controlled substance; robbery; assault.	
Connecticut	Assault; possession of firearm; offer of sale and distribution of controlled substances; disruptive behavior.	Possession of firearm, deadly weapon or dangerous instrument; offer of sale and distribution of a controlled substance.	M But not required if student is expelled for possession of a firearm or the offering and selling of controlled substances.
Delaware		Possession of a weapon or illegal drugs.	M
District of Columbia		Possession of a weapon.	M
Florida	Violence against any school district personnel; violation of school's sexual harassment policies; formally charged with a felony or delinquent act.	Violence against any school district personnel or school property; violation of school's sexual harassment policies; possession of a firearm; willful disobedience; open defiance of authority; charged with a felony; unlawful possession or use of controlled dangerous substances.	M
Georgia	Assault or battery.	Possession of a weapon.	M
Hawaii	Possession of a dangerous weapon; possession of liquor or illicit drugs.	Possession of dangerous weapon; possession liquor or illicit drugs.	M
Idaho	Disruption of good order.	Carrying weapon or firearm.	
Illinois	Gross disobedience and misconduct.	Possession of weapon.	V
Indiana	Misconduct; substantial disobedience; other unlawful activity.	Possession of firearm and deadly weapon (e.g. , Swiss Army knife); misconduct, substantial disobedience; other unlawful activity.	M

Iowa	Possession of a dangerous weapon; possession of alcoholic beverages,	Possession of a dangerous weapon.	M
Kansas	Willful violation of student conduct regulation; disruptive conduct, conduct which endangers safety of others; commission of a felony or misdemeanor; disobedience of an order of school official; possession of a weapon; possession or use of illegal drugs.	Possession of a weapon; possession of drugs; willful violation of student conduct regulation; disruptive conduct, conduct which endangers safety of others; commission of a felony or misdemeanor; disobedience of an order of school official.	M
Kentucky	Willful disobedience or defiance of authority; use of profanity or vulgarity; assault or battery; threat or force of violence; possession of alcohol and drugs; possession of weapons or dangerous instruments.	Possession of a weapon or dangerous instrument; possession of prescription drugs with the intent to distribute; assault or battery.	M
Louisiana	Willful disobedience; intentional disrespect toward school official; use of unchaste or profane language; use of tobacco or possession of alcoholic beverages or controlled dangerous substances; cuts or defaces school property; possession of firearm; habitually tardiness and absenteeism; other serious offenses.	Possession of a weapon.	M
Maine	Forming secret fraternities or societies; deliberate and disorderly conduct.	Deliberate disobedience or deliberate disorder; possession of firearm; possession and trafficking of drugs; forming secret fraternities or societies.	V
Maryland		Possession of a firearm	M
Massachusetts	Possession of dangerous weapon; possession of illegal drugs, alcohol or legal drugs (e.g., Prozac or anti-depressants); hitting or pushing teacher, school official or employee; felony complaint or conviction.	Possession of dangerous weapon; possession of illegal drugs, alcohol or legal drugs (e.g., Prozac or anti-depressants); assault (including hitting or pushing teacher school official); felony conviction.	V For expelled students

Michigan	Gross misdemeanor or persistent disobedience.	Possession of dangerous weapon; arson; criminal sexual conduct; physical assault by student in grade 6 or above; gross misdemeanor or persistent disobedience.	V
Minnesota	Disruptive behavior.	Possession of a firearm.	M
Mississippi		Possession of dangerous weapon or firearms; possession of controlled substances.	V
Missouri	Possession of a weapon.	Possession of a weapon.	V
Montana	Possession of a firearm.	Possession of a firearm.	
Nebraska	Violence, force, coercion, threat, intimidation; willfully causing or attempting to cause substantial damage to property, stealing or attempting to steal property of substantial value, or repeated damage or theft involving property; causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student; threatening or intimidating any student for the purpose of or with the intent of obtaining money or anything of value from such student; possession of a firearm; engaging in the unlawful possession, selling, dispensing, or use of a controlled substance or an imitation controlled substance; or alcoholic liquor being under the influence of a controlled substance or alcoholic liquor; public indecency; sexually assaulting or attempting to sexually assault any person.	Violence, force, coercion, threat, intimidation; willfully causing or attempting to cause substantial damage to property, stealing or attempting to steal property of substantial value, or repeated damage or theft involving property; causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student; threatening or intimidating any student for the purpose of or with the intent of obtaining money or anything of value from such student; possession of a firearm; engaging in the unlawful possession, selling, dispensing, or use of a controlled substance or an imitation controlled substance; or alcoholic liquor being under the influence of a controlled substance or alcoholic liquor; public indecency; sexually assaulting or attempting to sexually assault any person.	M
Nevada	Possession of a firearm; possession and sale of a controlled substance; membership in a gang; battery on school official.	Possession of a firearm; possession and sale of a controlled substance; membership in a gang; battery on school official.	V

New Hampshire	Gross misconduct.	Gross misconduct; theft; destruction; violence; possession of a pellet or BB gun or rifle.	
New Jersey	Possession of a firearm; assault with weapon; continued and willful disobedience; open defiance of authority; physical assault upon another student, taking or attempting to take personal property or money from another student, willfully causing damage to school property; unauthorized occupancy of school grounds, knowing possession or consumption of alcohol or dangerous substances.	Possession of a firearm; assault with weapon; continued and willful disobedience; open defiance of authority; physical assault upon another student, taking or attempting to take personal property or money from another student, willfully causing damage to school property; unauthorized occupancy of school grounds, knowing possession or consumption of alcohol or dangerous substances.	M Unless not available in school districts
New Mexico		Possession of a weapon.	
New York	Insubordinate or disorderly conduct.	Possession of weapon.	M
North Carolina	Willful violation policies of conduct; physical assault or serious injury to another student, teacher or; false bomb threats school; personnel.	Possession of weapon; presents a clear threat to school safety.	M/V
North Dakota	Insubordination; habitual indolence; disorderly conduct; possession of a weapon.	Possession of a firearm.	V
Ohio	Disruptive behavior.	Possession of weapon.	V
Oklahoma	Violation of school regulation; immorality.	Possession of a firearm.	V
Oregon	Assaults or menaces a school employee or another student; willful disobedience and defiance of authority; use or display or profane or obscene language; property damage; possession of a weapon.	Assaults or menaces a school employee or another student; willful disobedience and defiance of authority; use or display or profane or obscene language; property damage; possession of a weapon.	V
Pennsylvania	Disobedience or misconduct.	Possession of weapon.	M

Rhode Island	Disruptive behavior; possession of a firearm or realistic replica of firearm.	Possession of a weapon or firearm.	√
South Carolina	Commission of any crime; gross immorality; gross misbehavior; persistent disobedience.	Possession of firearm; commission of any crime; gross immorality; gross misbehavior; persistent disobedience.	V
South Dakota	Insubordination or misconduct; aggressive violent behavior; consumption or possession of alcoholic beverages; use or possession of a controlled dangerous substance; use or possession of a firearm; property damage.	Consumption or possession of alcoholic beverages; use or possession of a controlled dangerous substance; use or possession of a firearm.	
Tennessee	Immoral or disreputable conduct; violence or threat of violence; property damage; assault of school official with vulgar language; possession of a firearm; drug use.	Battery upon school official; possession of narcotics or weapons.	M
Texas		Possession of firearm, illegal knife, club or weapon.	M
Utah	Frequent or flagrant willful disobedience, defiance of proper authority, or disruptive behavior, including the use of foul, profane, vulgar, or abusive language; willful destruction or defacing of school property; possession, control, or use of an alcoholic beverage; the possession, control, or actual or threatened use of a real, look alike, or pretend weapon, explosive, or noxious or flammable material; or the sale, control, or distribution of a drug or controlled substance, an imitation controlled substance defined, or drug paraphernalia; commission of an act involving the use of force or the threatened use of force.	Possession of a firearm; aggravated assault; arson; possession, use and distribution of marijuana or controlled substance.	V

Vermont	Ongoing threat; disruptive behavior; possession.		
Virginia		Possession of firearm.	M
Washington	Gang activity; defacing of property.	Possession of firearm or deadly weapon; gang activity.	V
Wisconsin	Disobeying school rules, conveying threat or false information concerning the destruction of school property; possession of a firearm.	Disobeying school rules, conveying threat or false information concerning the destruction of school property; possession of a firearm; disruptive conduct.	M
West Virginia	Use, sale or possession of narcotics; felonious act; threat to injure; willful disobedience; possession of alcohol; use of profane language directed at school employee or pupil; intentionally defaced any school property; participation in any physical altercation; habitually violated school rules or policies.	Use, sale or possession of narcotics; possession of firearm or deadly weapon; felonious act; threat to injure; willful disobedience; possession of alcohol; use of profane language directed at school employee or pupil; intentionally defaced any school property; participation in any physical altercation; habitually violated school rules or policies.	M
Wyoming		Possession, use or carrying of a deadly weapon.	

*Individual school districts may have more expansive disciplinary codes than required by state law

SOURCE: *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline,* Civil Rights Project at Harvard University and the Advancement Project, (June 2000), Appendix III.

APPENDIX C
SCHOOL DISCIPLINE DATA COLLECTION BY STATE

SCHOOL DISCIPLINE DATA COLLECTION BY STATE

State	Suspensions	Expulsions	Alternative educational program	By Race	By Gender	Offense
Alabama	√	√				√
Alaska		√				
Arizona	√	√				√
Arkansas	√	√		√	√	√
California	√	√	√	√	√	
Colorado	√	√				
Connecticut	√	√				√
Delaware	√	√				√
District of Columbia						
Florida	√	√				
Georgia	√			√	√	√
Hawaii		√				√
Idaho	√	√				√
Illinois	√					√
Indiana	√	√		√	√	√
Iowa	√	√				√
Kansas	√					√

SCHOOL DISCIPLINE DATA COLLECTION BY STATE (CONTINUED)

State	Suspensions	Expulsions	Alternative educational program	By Race	By Gender	Offense
Kentucky	√	√				√
Louisiana	√	√				√
Maine						
Maryland	√	√				√
Massachusetts	√	√				
Michigan	√	√				
Minnesota	√	√		√	√	√
Mississippi		√				√
Missouri						√
Montana						
Nebraska		√				√
Nevada	√	√				√
New Hampshire						
New Jersey						
New Mexico	√				√	
New York						
North Carolina						
North Dakota						

SCHOOL DISCIPLINE DATA COLLECTION BY STATE (CONTINUED)

State	Suspensions	Expulsions	Alternative educational program	By Race	By Gender	Offense
Ohio				√		
Oklahoma						
Oregon		√				√
Pennsylvania	√	√				√
Rhode Island	√		√	√	√	√
South Carolina	√			√ Not mandated	√	√
South Dakota						
Tennessee	√	√		√	√	
Texas	√	√	√	√	√	√
Utah						
Vermont						
Virginia	√	√				√
Washington	√	√				
Wisconsin	√	√	√	√	√	√

SCHOOL DISCIPLINE DATA COLLECTION BY STATE (CONTINUED)

State	Suspensions	Expulsions	Alternative educational program	By Race	By Gender	Offense
West Virginia	√					
Wyoming						

SOURCE: *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, Civil Rights Project at Harvard University and the Advancement Project, (June 2000), Appendix V.

Table A1—Percentage of public schools reporting that they have a zero tolerance policy for various specified student offenses, by selected school characteristics: 1996–97

School characteristics	Types of offenses					
	Violence	Firearms	Weapons other than firearms	Alcohol	Drugs	Tobacco
All public schools	79	94	91	87	88	79
Instructional level						
Elementary school	79	93	91	87	88	82
Middle school	75	95	90	86	90	77
High school	80	96	92	86	89	72
School enrollment						
Less than 300	76	93	89	84	84	76
300–999	79	94	91	88	89	82
1,000 or more	86	98	93	85	92	72
Locale						
City	87	97	95	89	91	83
Urban fringe	82	95	90	88	90	80
Town	71	90	86	82	83	77
Rural	76	94	92	88	89	78
Region						
Northeast	78	89	90	83	84	79
Southeast	83	95	89	90	92	80
Central	72	93	88	82	83	75
West	83	97	95	91	93	83
Percent minority enrollment						
Less than 5 percent	71	92	88	82	83	75
5–19 percent	79	94	92	89	90	80
20–49 percent	83	95	90	87	89	79
50 percent or more	85	97	94	90	92	83
Percent of students eligible for free or reduced-price school lunch						
Less than 20 percent	76	92	88	86	87	77
20–34 percent	77	94	90	87	88	82
35–49 percent	79	97	95	89	92	81
70–74 percent	80	95	90	85	88	79
75 percent or more	84	95	93	87	89	81

SOURCE: U.S. Department of Education, National Center for Education Statistics, Fast Response Survey System, "Principal/School Disciplinarian Survey on School Violence," FRSS 63, 1997.

Guidance for Fighting A Zero Tolerance Injustice

1. If at all possible get an attorney's advice ASAP. Try to find one that has dealt with Zero Tolerance/expulsion related law. This is often difficult but contact the state bar association they can sometimes point you to some possibilities. Take an attorney to the first and every hearing (if possible). Get and bring an attorney to your appeal hearing even if you don't intend to pursue the appeal beyond the school district. They don't need to know that. They are generally much more reasonable when an attorney is there. If they have over stepped their limits the attorney will usually know and that can make a big difference. They are also less likely to try and bully you.

With respect to finding a good attorney, if you have heard of another ZT related case in your state, try to find out who the attorney was that represented the student in that case especially if they were successful. But even if they were not successful, that attorney should be relatively familiar with the education statutes that are relevant. The unfortunate reality is that the attorneys that are most familiar with education law all work for school districts. As mentioned above the state Bar Association may be able to supply you with a list of such attorneys. We found that to a person they were unwilling to help us, apparently because they were afraid of alienating their bread and butter customer (school districts). We found a recently retired school attorney that was willing to help us, not as our primary attorney but as a consultant. We were referred to him by one of the actively practicing school district attorneys that was sympathetic to our case but still not willing to assist us outright. If you cannot find an attorney that is has actual experience with ZT related education law, your next best bet is probably an attorney that specializes in civil rights litigation or even family law. The bottom line, in my opinion, is that any attorney is better than no attorney in the early stages of these battles.

2. Get copies of any evidence the school has that indicates your son or daughter was informed of the Zero Tolerance rules.

3. Get and read/study the relevant school policies, procedures, handbooks etc. Know them better than the school.

4. Look up you state laws on the subject, they are usually straightforward to read and understand. Check out: **http://www.law.cornell.edu/statutes.html#state** . Most of the state statutes can be found at this free web site.

5. If you think your school district is exceeding their authority under the law, make sure that argument is made at your hearings and that it becomes part of the expulsion record for your son or daughter.

6. Typically you can not pursue your battle in the court unless you exhaust all the appeal options within a school district

7. Present all your arguments both verbally and in writing

8. **In general, you should NOT let the hearing officer or anyone question your son or**

daughter. They will try their best to get them to incriminate themselves. Your son and/or daughter should take the 5th! It happens time and time again, that the only evidence they have is your son or daughter's honesty. These ZT zealots do not place ANY value on honesty and integrity. Do NOT BE NAIVE (like I was). These are not the same kind of school officials you remember from your childhood.

9. Present and submit everything that is conceivably relevant to your case at the district hearings. Date and label the material as prepared and/or presented at the relevant hearing. Make sure there is no question as to what you told who and when your told them. In Colorado if you pursue a judicial review of the school board's decision, no new evidence (above and beyond what the school district considered) can be submitted to support your case.

10. Find out ahead of time if the school board has ever made an exception relative to the ZT offense and punishment your son or daughter is likely to get. They will usually tell you and tell you why they made the exception. If they have never made an exception you will know that going in pleading for lenience is not likely to work. In which case you might as well assume a more assertive/aggressive posture. You need to decide if there is anything to lose……

11. Bring a tape recorder and record the hearing if possible. The school district might do that as well but do not depend on them for a tape or to record the session correctly.

12. If the only evidence is another student(s) accusation, pay for and get your son or daughter polygraphed professionally. Assuming they pass the polygraph you will want to submit that as evidence at your district appeal (s). You need to move fast to make this happen in time (see #8 above).

13. Consider going to the press if you situation is really outrageous. School District's tend to be more reasonable if they know their lack of common sense is going to be publicized to their friends and neighbors. The press will not always cover your story and they are not always that accurate in their coverage. Going to the press can be painful but it can help. Look at how the Decatur School Board started compromising once Jessie Jackson and the TV camera's showed up. The two year expulsion was reduced to one year and alternative schooling was offered for the 1 year expulsion period.

14. In most states there are time limits for requesting appeals within the district and beyond. If you fail to request an appeal hearing within the specified time limit you typically forfeit your right to that appeal. Find out what these time limits are ASAP and use time registered mail options to document the timeliness of your requests for those hearings.

15. If you feel you have been injured in a manner that may be recoverable (that is if you think you can sue for monetary damages) there is usually a time limit on the exercising of that option. In Colorado, I believe you have 180 days from the incident to at least declare an intent to sue. You can then bring such a suit at a later date.

16. If you urgently need to get your son or daughter back in school and have exhausted your in-school district appeal options, you will need to pursue a court ordered injunction. If you get such an injunction, it normally bodes well for your eventual success. If you don't get the injunction that might tell you something. Getting an injunction may take a few weeks. In court time, that is quick!

17. The courts give the school districts lots of latitude. Winning in court will not be easy. Typically the school district's actions have to be pretty outrageous to be reversed by a judge. Kids are not accorded the same degree of justice that adults are so don't go into the battle with expectation of constitutional "Due Process." It's a myth when it comes to kids and schools.

A M E R I C A N B A R A S S O C I A T

NEWS RELEA

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ABA Votes to Oppose School 'Zero Tolera Policies

SAN DIEGO, Feb. 19, 2001 -- The American Bar Association today voted to oppose sc tolerance" disciplinary policies that fail to take into account the circumstances or nature or an accused student's history.

(See Resolution and Report)

In taking this action, the ABA's policy-making House of Delegates supported three princ concerning school discipline:

1. Schools should have strong policies against gun possession and be safe places to learn and develop;
2. In cases involving alleged student misbehavior, school officials should exercise s discretion that is consistent with principles of due process and considers the indi and the particular circumstances of misconduct; and
3. Alternatives to expulsion or referral for prosecution should be developed that will student behavior and school climate without making schools dangerous.

In other significant action, the ABA adopted a series of resolutions on immigration law, s appointment of counsel at government expense for unaccompanied children at all stage immigration processes; opposing the involuntary transfer of detained immigrants and as to facilities that impede an existing lawyer/client relationship; opposing the use of secret immigration proceedings; and urging that gender- based persecution be recognized as asylum.

The ABA also voted to support the International Criminal Court, to urge study of the fact contribute to low citizen participation in jury service, to approve model standards of prac and divorce mediation, and more.

The American Bar Association is the largest voluntary professional membership associa world. With more than 400,000 members, the ABA provides law school accreditation, c education, information about the law, programs to assist lawyers and judges in their wo initiatives to improve the legal system for the public.

Complete list of ABA 2001 Midyear Meeting House of Delegates action

The concurring justices reviewed the legal concepts of academic freedom and relief from governmental speech mandates. The justices agreed that ***Abood*** and ***Keller*** were not on point. In the present case, students were not asked to fund a particular student group, but rather fund a distributing agency that had no special political or ideological views. *Id* at 13. Further, the mandatory fee was utilized to broaden public discourse, which is a legitimate governmental interest. Finally, the justices equated objections to the activity fees with tuition dollars that support faculty views that some students may find objectionable. The justices concluded that since universities do not have to offer a spectrum of courses to ensure viewpoint neutrality of classroom content, it was difficult to determine how student activity fees could present a stronger legal argument for a refund. *Id* at 14.

ELEMENTARY AND SECONDARY EDUCATION

Pupils

Constitutional Rights

Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F.Supp.2d 812 (C.D.Ill. 2000). High school students expelled for fighting in the stands during a football game, along with their adult representatives, sought a court order reinstating the students in school. Despite a claim that school officials informally discouraged attendance at meetings by telling parents that expulsion was a foregone conclusion, the plaintiffs received sufficient notice of the proceedings to satisfy procedural due process. The superintendent sent a letter to each parent setting forth the date, time and place of the hearing before a hearing officer and of the board meeting where the expulsion decision was made. The plaintiffs were advised that expulsion was a possible sanction. Procedural due process was not violated when the board allegedly did not advise them of their appellate rights, failed to listen to a tape recording of an evidentiary hearing or request evidence from the students' files. Equal protection rights of the black high school students were not violated despite statistics which showed that eighty-two percent of expelled students during a certain period were black, as opposed to a black student body ratio of forty-six to forty-eight percent. No statistical comparison was made between black and white students expelled for fighting, and there was anecdotal evidence that whites had been expelled for that reason. Procedural and substantive due process rights of the students were not violated by the board's adoption of a zero tolerance policy towards violence. The board's issuance of a resolution joining other districts in adopting a no tolerance position toward violence was a political statement rather than a binding policy. There was testimony from board members that zero tolerance played no role in the expulsion decisions. Police testimony at the expulsion hearings identified the students as members of well-established and recognized gangs. Therefore, the students' claims that their due process rights were violated through application of a disciplinary rule barring gang activity that was unconstitutionally vague due to its failure to adequately define "gangs," was denied.

Greenleaf ex rel. *Greenleaf v. Cote*, 77 F.Supp.2d 168 (D.Me. 1999). A principal's search of a middle school student for indications that she had been drinking did not violate the Fourth Amendment. The search was justified at its inception and was reasonable in its scope. The search was based on a tip from a reliable student-informant who had overheard students admit they had been drinking in the girls' locker room with the plaintiff. The student was called out of class and the hall doors were locked, insuring privacy while the student and her locker were searched. The student consented to the request that she open her backpack, turn the pockets of her garments inside out, and shake her shirt and pants. The search would have ceased if the student objected. The principal turned away when a bag fell out of the backpack and left inspection to a female colleague out of concern that the bag might have contained feminine hygiene products. Although no evidence of beer drinking was found, it could have been found in the places searched.

Students with Disabilities

Dickerson ex rel. *Ingram v. Brodgen*, 80 F.Supp.2d 1319 (S.D.Ala. 1999). Forty days after an administrative hearing officer determined that the defendants had deprived her son of a FAPE, the plaintiff applied for recovery of attorney fees as a prevailing party under the IDEA. The defendants argued that her application was time-barred. In ruling for the plaintiff, the court held that the applicable statute of limitations was the general, state, two-year statute for actions alleging injury to the person or rights of another, rather than the shorter, thirty-day limitations period for appeals from an administrative hearing.

Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F.Supp.2d 138 (W.D.N.Y. 1999). The defendant school district refused to place the plaintiff, a twenty-two-year-old student with multiple disabilities, in a non-approved post-secondary private residential facility. Two separate committees on special education (CSEs) had recommended placement in a residential facility, but the board had re-

YOU GIVE US 22 MINUTES...WE'LL GIVE YOU THE WORLD.

Boy suspended for pointing chicken finger

February 1, 2001 at 05:18:57

JONESBORO, Ark. (AP) -- **An 8-year-old boy was suspended from school for 3 days after pointing a breaded chicken finger at a teacher and saying, "Pow, pow, pow."**

The incident apparently violated the Jonesboro School District's zero-tolerance policy against weapons. The boy was suspended last week.

Kelli Kissinger, mother of first-grader Christopher, said she believed the punishment was too severe.

"I think a chicken strip is something insignificant," she said. "It's just a piece of chicken. How could you play like it's a gun?"

South Elementary principal Dan Sullivan said he was prevented by law from discussing Christopher's suspension.

Sullivan said the school has zero-tolerance rules because the public wants them.

In March 1998, four students and a teacher were killed and 10 others wounded when two youths opened fire on a schoolyard at Jonesboro's Westside Middle School.

"People saw real threats to the safety and security of their students," Sullivan said.

A school discipline form provided by the boy's mother and signed by Sullivan says the child was suspended because he "took a chicken strip off his plate, pointed it at (a teacher) and said 'Pow, pow, pow,' like he was shooting her."

Sullivan said punishment for a threat "depends on the tone, the demeanor, and in some manner you judge the intent. It's not the object in the hand, it's the thought in the mind. Is a plastic fork worse than a metal fork? Is a pencil a weapon?"

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Number and Percentage of Schools In Which Specified Disciplinary Actions Were Taken Against Students, Total Number of Actions Taken, and Percentage of Specific Disciplinary Actions Taken Against Students, By Type of Infraction: 1996-97

Infraction	Total Number of schools taking one or more of these specified actions	Percent of schools taking one or more of these specified actions	Total number of these specified actions taken	Expulsions (Number of actions taken)	Transfers to alternative schools or programs (Number of actions taken)	Out-of-school suspensions lasting 5 or more days (Number of actions taken)
Possession or use of a firearm	4,170	5	16,587	5,143	3,301	8,144
Possession or use of a weapon other than a firearm	16,740	22	58,554	13,698	12,943	31,970
Possession, distribution, or use of alcohol or drugs, including tobacco	20,960	27	170,464	30,522	34,255	105,723
Physical attacks or fights	30,160	39	330,696	50,961	62,108	217,627

SOURCE: U.S. Department of Education, National Center for Education Statistics, Fast Response Survey System, "Principal/School Disciplinarian Survey on School Violence," FRSS 63, 1997.